

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3	SUZANNE IVIE,)	
)	
4	Plaintiff,)	3:19-cv-01657-JR
)	
5	vs.)	June 21, 2021
)	
6	ASTRAZENECA PHARMACEUTICALS, LP,)	Portland, Oregon
)	
7	Defendant.)	

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10 (Jury Trial - Volume 6)

11 BEFORE THE HONORABLE JOLIE A. RUSSO

12 UNITED STATES DISTRICT COURT MAGISTRATE

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1 (June 21, 2021)

2 P R O C E E D I N G S

3 (Open court; jury not present:)

4 THE COURT: Good morning, Counsel. It is
5 eight o'clock. We are going to get going. We have an hour
6 before the jury arrives, so I want to try to accomplish all of
7 our business.

8 Thank you for the briefing and the oral argument on
9 both motions. I will give you my rulings on both of those
10 motions. We will then move directly to jury instructions; go
11 through the instructions. You are welcome to give me your
12 comments, or a very brief comment on a different proposed
13 instruction, and you may then take your objections on the
14 record. Then we are going to move on to the verdict form; same
15 thing. So my goal is to be finished and perhaps even give all
16 of us a five-minute break before I bring the jury in.

17 Turning first to plaintiff's oral motion for judgment
18 as a matter of law, pursuant to Federal Rule of Civil Procedure
19 50(a), I find that a reasonable jury would have a legally
20 sufficient basis to find there was a legitimate business reason
21 to terminate the plaintiff. For that reason, plaintiff's
22 motion is denied.

23 Turning next to defendant's motion for judgment as a
24 matter of law, those are documents 134 and plaintiff's
25 response, 136, regarding plaintiff's fifth, sixth, and seventh

1 claim, and the Oregon state law claim.

2 Turning first to plaintiff's argument of waiver, I
3 find that plaintiff mischaracterizes this as a personal
4 jurisdiction argument. I find no legal basis to assert waiver.

5 Turning next to the defendant's argument, an
6 interesting argument, I was unable to find any controlling law
7 on whether the discriminatory act had to have occurred in
8 Oregon in order for plaintiff to take advantage of Oregon's
9 employment statute. As long as plaintiff was an employee who
10 performed work in Oregon, she is covered. So in other words,
11 as long as defendant is an employer under Oregon law, and
12 plaintiff is a employee who worked at least some of her time in
13 Oregon, the Oregon employment laws applied even if the
14 discriminatory conduct occurred outside of Oregon.

15 I could not find any case law that held Oregon law
16 would not apply in plaintiff's situation. I don't find the
17 District of Oregon cases sufficiently persuasive to justify
18 granting relief on a Rule 50 motion. I did find a recent law
19 review article that dealt with presumptions against
20 extraterritoriality of state law, which unsurprisingly found
21 the status of the presumption in Oregon to be unclear. That's
22 further evidence, in my mind, that there does not exist an
23 Oregon state court opinion that is on point on this topic.
24 Therefore, defendant's Rule 50(a) motion is denied.

25 Turning now to the jury instructions, what I would

1 like to do is just literally go through them one page at a
2 time, and I will ask both sides if there are any objections.
3 If there are no objections, it is in as drafted. If there is
4 an objection, I'll hear briefly about why you think it should
5 be different, and we will go from there.

6 The other thing I will say, every opportunity I had
7 to list from the Ninth Circuit model instruction, I did. If
8 there was a choice, I lifted from the Ninth Circuit model, just
9 FYI.

10 Duty of the jury, 1.4. I am going to give you the
11 number of the Ninth Circuit model that I took it from.

12 Any objection? If I hear nothing, I'm going to
13 assume no objection.

14 Page 3, burden of proof, 1.6.

15 Page 4, what is evidence, 1.9.

16 Page 5, what is not evidence, 1.10.

17 Direct and circumstantial, page 6, 1.12.

18 Page 7. Are there stipulations of fact that you
19 would like me to read to the jury? I wasn't sure

20 MR. OSWALD: Yes, Your Honor. There is one.

21 THE COURT: Okay.

22 MR. OSWALD: It is a joint stipulation.

23 THE COURT: Okay. Then that's something you can hand
24 to me?

25 MR. OSWALD: Yes. Do you want me to pass it up now?

1 THE COURT: Pass it up now just so I don't forget.

2 MR. OSWALD: May I approach, Your Honor?

3 THE COURT: Yes, please. Thank you, sir.

4 So I will read this stipulation. And that is from
5 2.2.

6 Page 8, expert opinion, 2.13.

7 Page 9, I used both 2.14 and 2.15, charts and
8 summaries.

9 Page 10, evidence in electronic format, came from
10 2.16. We will roll the entire JERS cart in the jury room. It
11 has a nice, big projector. The IT person, probably Pat, will
12 go in the jury room and show them how to operate it.

13 Page 12, corporations, 4.1.

14 Page 13, liability of corporations, 4.2.

15 Moving next to page 14, both claims, that came from
16 10.8.

17 Any objections?

18 MR. OSWALD: Yes, Your Honor. This is on the False
19 Claims Act.

20 THE COURT: Yes.

21 MR. OSWALD: Your Honor, I don't have any issue at
22 all with using the text from the statute. It says, "Because
23 of," and certainly I don't have an issue there. It is when we
24 delve into the use of "but for" that I have a concern, because
25 the formulation that you have identified here is in fact

1 incomplete. The statute says "because of." The Supreme Court
2 says that that means "but for." But the Supreme Court and the
3 Ninth Circuit, in the wake of the Bostock case and Thomas case,
4 have said what that means.

5 So here is what I propose: What I proposed is that
6 we change the current formulation to "the plaintiff's
7 complaints were one 'but for' cause of defendant's decision."

8 THE COURT: Where are you on the draft instruction?

9 MR. OSWALD: So this is -- this would be in lieu of,
10 "A plaintiff is subjected to an adverse employment action
11 because she engaged in activity protected by the False Claims
12 Act," and then the following formulation: "If the plaintiff's
13 complaints were one 'but for' cause of defendant's decision or
14 defendant's adverse actions."

15 THE COURT: So your proposal is, "A plaintiff is
16 'subjected to an adverse employment action' because she engaged
17 in activity protected by the False Claims Act."

18 MR. OSWALD: "Where the plaintiff's protected
19 activity were one 'but for' defendant's decision to fire her."

20 THE COURT: Defendant.

21 MS. TALCOTT: Your Honor, we object to an instruction
22 outside of what the model Ninth Circuit instructions provide.
23 Plaintiff's reliance on Bostock is misplaced. It is not a
24 False Claims Act case.

25 The Sixth Circuit declined to apply Bostock to claims

1 outside of Title VII. So we just think this language isn't
2 applicable, and we should stick to the model jury instruction.

3 THE COURT: Okay.

4 MR. OSWALD: Your Honor, Thomas is from the
5 Ninth Circuit. It was issued on April 21st. Although it was a
6 Mine Safety Act case, it uses the same formulation, "because
7 of." The Ninth Circuit in Thomas stated specifically that this
8 is the correct formulation. So I think that there is
9 controlling authority in the Ninth Circuit, in light of Thomas,
10 that compels the Court, if you are going to go to "but for" --
11 look, I don't have any problem with "because of." It is in the
12 statute. If you stray beyond the statute by using "but for," I
13 just want to make sure it is not misleading and that it is
14 consistent with Ninth Circuit case law.

15 MS. TALCOTT: Your Honor, as plaintiff stated, the
16 Thomas case is a Mining Act case. That's a wholly separate
17 statute. You can't take an interpretation from a very
18 different statute and apply it here. What we need to do is
19 look at what the Ninth Circuit has said about the proper
20 standard is for jury instructions under the False Claims Act,
21 and that's the model jury instruction.

22 MR. OSWALD: Your Honor, the other formulation is to
23 simply take out that paragraph in its entirety. It is
24 surplusage. We simply have the three elements, and then we go
25 right to, "Here, the parties agree."

1 MS. TALCOTT: Your Honor, the jury needs to be
2 instructed as to what the causation standard is. Again, the
3 model jury instruction for the False Claims Act provides that
4 standard. Relying on or speculating as to what might be
5 applied from a different statute down the road isn't
6 appropriate here, when we have a model jury instruction right
7 on point.

8 THE COURT: Okay. I'm going to go with the
9 instruction, as written.

10 Plaintiff, you are entitled to take any objections at
11 the conclusion of this conference.

12 MR. OSWALD: Understood, Your Honor.

13 THE COURT: Page 15, the whistleblower, 58.01.

14 Any objection?

15 MR. OSWALD: No, not for the plaintiff.

16 MS. TALCOTT: No, Your Honor.

17 THE COURT: ADEA. That's 11.1. Page 16.

18 Page 17, the --

19 MR. OSWALD: I'm sorry. Yes, I do have an objection
20 on page 16, Your Honor.

21 THE COURT: Okay.

22 MR. OSWALD: It is under sub-header No. 3.

23 THE COURT: Okay.

24 MR. OSWALD: Again, for the record, the formulation,
25 which is that the defendant would not have terminated plaintiff

1 but for her age is now misleading, in light of Bostock, which
2 specifically did reference Nassar, which was the Supreme
3 Court's ADEA decision.

4 The Ninth Circuit has gone on, in Thomas, to
5 specifically identify "because of" as having a particular
6 formulation; that simply saying "but for" is not enough; that
7 it is important to explain what that means to a jury.

8 And here is the reason why, Your Honor, and the
9 rationale is important: Without this additional formulation,
10 the jury could conclude, as an example, that this is a
11 sole-cause case, or even a primary-cause case. And it is
12 not -- not after Bostock and not after Thomas.

13 So that's why we have to give "but for" some context,
14 to make it clear to the jury that it is not a sole motivation.
15 It is not the primary motivation, in light of Bostock and
16 Thomas, but that it is one factor. It is a "but for" cause.

17 To do otherwise is misleading to the jury, when we
18 don't have to be misleading. We simply either can cut it off
19 and add "because of," as the statute says, or we can go forward
20 and state specifically what "but for" means.

21 I understand your point of view, which is, look, we
22 got Ninth Circuit jury instructions, but those jury
23 instructions were enacted for ADEA and that were enacted for
24 the anti-retaliation provision of the federal False Claims Act
25 were written before Bostock and before Thomas. So they are

1 guides, for sure, but they need to reflect the current status
2 of the Ninth Circuit case law.

3 MS. TALCOTT: Your Honor, the status of the
4 Ninth Circuit case law hasn't changed. Again, plaintiff's
5 reliance on Bostock, it is inappropriate here. In fact, the
6 Sixth Circuit in the Pelcha V. MW Bancorp. case held that
7 Bostock doesn't apply to the ADEA claims and that Gross was
8 still controlling. Again, we encourage the Court to rely on
9 the model jury instructions provided by the Ninth Circuit, and
10 there is no controlling case law that changes that.

11 MR. OSWALD: In reply, Your Honor, I would say that
12 Thomas really eviscerates the defendant's argument here.
13 Thomas is a Ninth Circuit case, on April 21st, that
14 specifically defines what "but for" means and what is required.
15 And it specifically states -- this is on page 1209 -- what the
16 danger is here in not giving the additional instruction. So
17 the jury could be misled potentially in finding that it is
18 solely or primarily a type of causation case, which is not the
19 case in light of the case law.

20 So I think it if we are going to go down a road of
21 including words that are not in the statute, that we have to be
22 complete and not misleading. I think to do that, I think we
23 have to embrace the notion that it is a "but for" cause or one
24 "but for" cause or add some modifier, which simply states that
25 it doesn't have to be the primary cause. It doesn't have to be

1 the sole cause, or even the primary cause; that a "but for"
2 cause is enough. Then that would give context what "but for"
3 means, and I ask the Court to include it in the jury
4 instruction.

5 THE COURT: Any response on Thomas?

6 MS. TALCOTT: It's the same. That is a Mine Safety
7 case. It isn't applicable here. It is a different statutory
8 scheme. We can't cherrypick that language out and think it is
9 going to be applicable to the ADEA.

10 THE COURT: Okay. I am going to give the
11 instruction, as drafted, on page 16.

12 Page 17, the retaliation claim. That is, again, 11.3
13 and 10.8.

14 Any objection?

15 MR. OSWALD: Your Honor, just for the record, I do
16 object. The formulation here should be changed. Specifically
17 this is in the section that begins, "A plaintiff is subjected
18 to an adverse employment action because she engaged in an
19 activity protected by the ADEA, if the adverse employment act
20 action would not have occurred but her engagement in that
21 activity."

22 The reason, Your Honor, is, once we add the "but for"
23 formulation, as before, we are misleading the jury that it
24 could be a sole cause or a primary cause type of causation
25 standard, which it is not, after Bostock and confirmed by

1 Thomas. Therefore, I raise the same objection for the record.

2 THE COURT: Thank you.

3 Page 18, willfulness, 11.14.

4 MR. OSWALD: No objection.

5 MS. TALCOTT: No objection.

6 THE COURT: Page 19. I think you agreed to this one.

7 MR. OSWALD: No objection, Your Honor.

8 THE COURT: Page 20, FMLA. Any objection?

9 MR. OSWALD: No objection, Your Honor.

10 MS. TALCOTT: Your Honor, defendant objects to this
11 instruction. We think that the negative factor test should not
12 be applied under Price v. Multnomah County, which was a FMLA
13 case. They applied the "but for" standard. Plaintiff is
14 relying on Nassar. In Nassar, the same "but for" standard that
15 applies in ADEA claims applies to Title VII retaliation claims,
16 because the retaliation section of Title VII does not contain
17 the motivating factor language found in the discrimination
18 section.

19 Given that the FMLA anti-retaliation standard also
20 does not include the motivating factor language, we think that
21 the "but for" standard applicable to Title VII retaliation
22 claims should apply. Also, that decision predates the Nassar
23 decision. Therefore, the deference to the DoL regulation is no
24 longer tenable.

25 Additionally, if the Court is inclined to give this

1 instruction, we ask that they separate out an instruction under
2 OFLA. OFLA actually applied a higher standard of substantial
3 factor, so if the Court is inclined to give the negative factor
4 causation standard for FMLA, which we object to, we think that
5 at least for OFLA there should be a different instruction with
6 the substantial factor test.

7 THE COURT: Thank you.

8 MR. OSWALD: Your Honor, two things: First off,
9 what's sauce for the goose is sauce for the gander. You're
10 using the Ninth Circuit pattern instruction, I'd ask you to be
11 consistent and use it here. There is a reason why the
12 Ninth Circuit pattern instruction is the way it is. It's
13 because the Family Medical Leave Act does not use the term
14 "because of." It's because FMLA doesn't use "because of." It
15 uses the term "discriminate." So because it does not use
16 "because of," Gross and Nassar and all of those cases are
17 simply inapplicable.

18 What the courts have done, they've said,
19 "'discriminate' is ambiguous; and therefore, we are going to
20 look to the Department of Labor regulations, which we give
21 Chevron deference, because the regulations themselves have been
22 offered, there has been a notice and comment period, and, in
23 fact, then the regulation and formulation should control."
24 Thus, it's the negative factor test.

25 There's nothing about any of the cases interpreting

1 the term "because of" changed that. It is simply a different
2 statute with a different word that is used. So for that
3 reason, I asked Court to maintain the Ninth Circuit jury
4 instruction as stated here.

5 THE COURT: Thank you. I am going to give the
6 instruction, as is. I am relying on three cases: Magee v.
7 Trader Joe Company. That was an April 2021 case. The cite is
8 2021WL1550336. I am relying on Schultz v. Wells Fargo Bank, a
9 District of Oregon case in 2013, 970 F.Supp. 2d at 1039 at page
10 cite 1052. And finally, Rieman v. Evraz, 848 F.3d 306, page
11 cite 307. That's a Ninth Circuit 2021 case.

12 Moving to page 21, state law employment
13 discrimination of 59A.02, any objection?

14 MR. OSWALD: No objection.

15 MS. TALCOTT: No, Your Honor.

16 THE COURT: Thank you.

17 Moving now to the final portion, damages, page 22, it
18 is a page and a half. The front pay language comes directly
19 from 5.4, and we've had this conversation. I understand that
20 front pay is awarded at the Court's discretion only if the
21 Court determines that Restatement is inappropriate. There is a
22 Ninth Circuit 2010 case on point, Traxler v. Multnomah County,
23 596 F.2d 1007.

24 Any objection to pages 22 and 23?

25 MR. OSWALD: None from the plaintiffs, Your Honor.

1 MS. TALCOTT: No, Your Honor.

2 Just to clarify, so the jury's determination of front
3 pay is just advisory?

4 THE COURT: Correct. Yes.

5 MS. TALCOTT: Thank you.

6 MR. OSWALD: Your Honor, forgive me. It would be
7 certainly advisory on the claims that are other than the Oregon
8 whistleblower statute, which, in fact, is legal in nature.

9 THE COURT: Right.

10 MR. OSWALD: So at least as it relates to that claim,
11 it would not be advisory.

12 THE COURT: Right.

13 MR. OSWALD: It would be advisory as to the others.

14 MS. TALCOTT: Your Honor, defendant objects to that.
15 Although there is language that says "compensatory damages,"
16 all of the Oregon employment statutes are intended to follow
17 the federal scheme, and there is case law indicating that the
18 jury's determination of front pay is advisory in Oregon as
19 well.

20 MR. OSWALD: Your Honor, that's just not right. The
21 statute says, "All common law remedies." It's one or the
22 other. In Oregon, "common law" means legal in nature. "Legal"
23 means for the jury. So there are, in fact, cases not on this
24 particular provision but in the companion provision. These
25 were cited in our motion to amend the complaint initially to

1 include punitive damages, which makes this point precisely. So
2 it is "legal" in nature. The case law is clear, and that
3 should go to the jury.

4 But honestly, for today's purposes, the way I'm going
5 to present it is backpay and front pay. The Court doesn't
6 necessarily have to rule on that issue today, because the jury
7 will get it.

8 THE COURT: I agree.

9 Ms. Talcott, maybe when you have a minute -- I agree
10 it is not emergent -- but please forward those cases.

11 MS. TALCOTT: Correct. I just needed to make a
12 record.

13 THE COURT: Page 24, you agree, non-economic damages.

14 Page 25, damages/mitigation, that came from 11.13.

15 Page 26, duty to deliberate, 3.1.

16 27, communications, 3.3.

17 And finally, page 28, return of the verdict.

18 Are there any additional objections up to the
19 instructions that counsel would like to make on the record?

20 MR. OSWALD: Yes, Your Honor. Thank you.

21 THE COURT: Go ahead, sir.

22 MR. OSWALD: Your Honor, I will renew my objections
23 that I previously stated. They are to jury instructions
24 Nos. 14, 16, 17. My objection is the same. It is that
25 including an incomplete formulation of "but for" is likely to

1 mislead the jury, thinking that this is a sole-cause or
2 primary-cause case.

3 We have articulated a formulation that indicates that
4 the jury should be instructed that plaintiff's protected
5 activity were one "but for" or a "but for" cause of the
6 defendant's decision to fire here. That would be adequate from
7 a plaintiff's perspective on each of those jury instructions --
8 14, 16, and 17

9 THE COURT: Thank you very much.

10 Turning now to the draft verdict form, as well as the
11 email we received from the defendants this morning, I agree
12 with suggestion A, spelling out the ADEA in Instructions 4 and
13 12.

14 Plaintiff, any objection to that?

15 MR. OSWALD: No, Your Honor.

16 THE COURT: Thank you. We will make that change.

17 The second suggestion was clarifying the time frame
18 that applies to backpay in Question No. 7.

19 Plaintiff.

20 MR. OSWALD: I'm not sure what the clarification is,
21 Your Honor. We put backpay before the jury. What's in
22 evidence is the amount of backpay from the date of firing up
23 through the first day of trial consistent with the case law.
24 That's what we are going to present. So I don't think it needs
25 to be changed.

1 MS. TALCOTT: Your Honor, just a simple clarification
2 to mirror the next question, which clarifies the forward time
3 frame, just to make sure they don't make the mistake and apply
4 it twice. It doesn't prejudice anybody. It is just a simple
5 clarification for the jury.

6 THE COURT: So what language would you like added?

7 MS. TALCOTT: At the end, say, "from the date of her
8 termination through the date of your verdict."

9 THE COURT: Okay. I will add that language.

10 MR. OSWALD: Your Honor, I think it is through the
11 first day of the trial actually. That's how we calculated it.
12 I think I prefer it that way to make sure it is calculated the
13 same.

14 MS. TALCOTT: We don't object to that.

15 THE COURT: "From the date of plaintiff's termination
16 through the first day of trial." Okay. We will add that
17 language.

18 The final suggestion, as to questions 10 and 11,
19 adding language to clarify that only economic damages as
20 opposed to all damages are subject to mitigation.

21 Are you sure that's correct, defendant? I found some
22 cases indicating that might not be correct.

23 Do you see case law supporting that?

24 MR. OSWALD: I'm sorry. Forgive me, Your Honor. I
25 am a little bit blindsided by this.

1 What is the proposed change? Is this to question 10?

2 THE COURT: It is to questions 10 and 11.

3 MS. TALCOTT: Your Honor, we will withdraw it.

4 THE COURT: I will say, for the record, there are two
5 cases that I found, one Ninth Circuit, 1999, and a recent
6 Eastern District of California case, 2019, that find the
7 argument that mitigation should have applied only to economic
8 damages is unpersuasive. And finding, again, defendant
9 correctly argued plaintiffs have a duty to mitigate both
10 economic and non-economic damages. Again, if you have case law
11 that says something different, please.

12 MS. TALCOTT: No. We withdraw the request.

13 THE COURT: Back to the verdict form to the jury form
14 as drafted, objections or any misspellings or if you see
15 something that's going to make it more difficult for the jury,
16 I would really appreciate knowing.

17 MR. OSWALD: Question No. 9, so that it is consistent
18 with the jury instruction, should say, "Emotional distress,
19 suffering" is fine, but then also reputational harm. The jury
20 instruction says -- this is the last sentence of the first
21 paragraph. "Finally, you should consider any injury to
22 plaintiff's reputation." So just so it is consistent with the
23 jury instruction, I would like the title to say "Emotional
24 distress, suffering, reputational harm."

25 Then the question itself, "What damages for emotional

1 distress, suffering, or reputational harm" --

2 THE COURT: Okay. That does track.

3 MR. OSWALD: -- "if any, plaintiff proved by a
4 preponderance of the evidence."

5 THE COURT: Okay. Defendant, any objection?

6 MS. TALCOTT: I mean, they are instructed on it. I
7 don't know that it is necessary on the verdict form.

8 THE COURT: I will give it, as modified. I think it
9 is helpful to the jury. I know they go back and forth between
10 the verdict form and the instructions, and I appreciate that
11 the language tracks.

12 Any other objections? Suggestions?

13 MR. OSWALD: Yes, Your Honor. For the reasons that I
14 raised with the Court with the jury instructions, here, I think
15 it is even more important that we don't stray into a false
16 instruction on the verdict form itself.

17 Question No. 1 is -- it should simply say, "Did
18 plaintiff prove by a preponderance of the evidence that
19 defendant terminated plaintiff because she complained about her
20 manager's alleged encouraging of off-label drug marketing,"
21 period.

22 There is no reason to continue with, "That is, the
23 defendant would not have terminated plaintiff but for that
24 complaint." The Court has already included a "but for"
25 instruction. To do it here, especially in light of the

1 concerns that I have raised about the fact that it is
2 potentially misleading under Supreme Court and Ninth Circuit
3 precedent, Bostock and Thomas, I think is compounding the
4 problem.

5 I'd ask the Court simply strike "that is" through
6 "but for that complaint" and put a period after "marketing."

7 MS. TALCOTT: Your Honor, defendant disagrees. We
8 think this language is helpful to the jurors to have the
9 standard right in front of them when they are answering the
10 question. We'd ask that it remain as it was drafted.

11 THE COURT: Okay. The verdict form will remain, as
12 drafted.

13 Counsel, thank you for making your objections on the
14 record.

15 MR. OSWALD: Okay. The formulation here would be
16 that plaintiff's complaints were a or one "but for" cause of
17 defendant's decision to fire her. That would be the ultimate
18 formulation that we would propose on Question No. 1 on the
19 False Claims Act/retaliation on the verdict form.

20 THE COURT: Okay. Thank you.

21 MS. TALCOTT: Your Honor, just to make our record, we
22 would just renew our objection to the language for the FMLA and
23 OFLA retaliation.

24 THE COURT: Okay. Thank you.

25 MR. OSWALD: Your Honor, for the same reason,

1 Question No. 3, the claim for Age Discrimination in Employment,
2 ADEA discrimination, plaintiff asks that the Court strike, and
3 simply put a period after "because of her age," and strike,
4 "That is, plaintiff would not have terminated plaintiff but for
5 her age." It is misleading because it doesn't give the
6 complete picture of what "but for," means consistent with case
7 law, Bostock and Thomas. We would ask the Court either include
8 additional language. That additional language would simply
9 read, "The plaintiff's complaints were one 'but for' cause for
10 defendant's decision to terminate her," or strike that phrase
11 in its entirety.

12 THE COURT: Thank you. Anything further on the
13 verdict form?

14 MR. OSWALD: Yes, Your Honor.

15 On Question No. 4, the claim for age discrimination,
16 under the Age Discrimination in Employment Act retaliation, for
17 the same reason we ask the Court to strike the part of the
18 instruction that begins, "That is, defendant would not have
19 terminated plaintiff but for that complaint." We contend that
20 is misleading of a "but for" formulation. A more accurate
21 formulation would be the plaintiff's complaints were one "but
22 for" cause or a "but for" cause of defendant's decision to fire
23 her, or to strike that provision in its entirety, consistent
24 with Bostock and Thomas.

25 THE COURT: Thank you. Keep going, if there is

1 anything further.

2 MR. OSWALD: Your Honor, that is all we have.

3 THE COURT: Okay. There are no misspellings, really?
4 Double-check. That's so embarrassing when a jury gets that.

5 MS. TALCOTT: Your Honor, defendant filed two motions
6 yesterday that may result in jury instructions.

7 Would you like to hear argument on those?

8 THE COURT: Yes. I'm sorry. I did not see those.

9 MS. TALCOTT: We filed a motion yesterday to have the
10 Court strike the hearsay portion of Mr. Sevart's, plaintiff
11 vocational rehab expert's testimony. Although an expert can
12 rely on hearsay, it is still improper, even if they are an
13 expert, for them to repeat the hearsay statements to the jury.

14 Mr. Sevart testified to what plaintiff told him about
15 his job search efforts and how the number of interviews went
16 and even what she was relaying to him that the interviewers
17 told her. So that's the double hearsay.

18 Again, Mr. Sevart can rely on what the plaintiff
19 tells him in coming to his opinions, but it was improper for
20 him to repeat those out-of-court statements. That is per se
21 hearsay. There is a great danger to the defendant that the
22 jury is going to rely on those for the truth. And because
23 plaintiff in this case did not testify to any of those facts
24 herself and, in fact, her expert testified after she testified,
25 there is no way for the defendant to correct any misconception

1 or go into that testimony in the case.

2 So for that reason, we'd ask that the jury be
3 instructed to disregard what Mr. Severt said regarding
4 statements that plaintiff relayed concerning her job search
5 efforts and her interviews.

6 THE COURT: Thank you.

7 MS. CHAMBERS: Judge, in response to that, a few
8 things: First, defendant's motion that was filed, I think
9 yesterday at midnight, has no case law supporting its position.
10 In fact, the only statute that it references is the Federal
11 Rules of Evidence 703, which supports that an expert can rely
12 on hearsay. The transcript that defendant attached has the
13 fact that defendant made this objection. I cited to the rule.
14 You overruled the objections. So this matter has already been
15 decided on.

16 Further, Mr. Severt was qualified as an expert in
17 vocational rehab. It is his job to make opinions and
18 statements based on his conversations with the plaintiff and
19 his review of the documents in this case. He noted in his
20 report and in his testimony that he reviewed job search records
21 and everything that the plaintiff did to find another job.

22 Further, Ms. Talcott's argument that Ms. Ivie didn't
23 discuss her mitigation at length, defendant could have called
24 Ms. Ivie in their case-in-chief and ask her those questions.
25 It did not.

1 So for those reasons, we ask that the motion be
2 denied.

3 One last thing: The jury instruction that is
4 provided is extremely misleading, and I think would cause the
5 jury to be confused. It states, "Mr. Severt testified about
6 some specific job interviews the plaintiff had and the
7 statements and the responses of prospective statements of
8 employers in those job interviews, and I instruct you not to
9 consider that portion of Mr. Severt's testimony in reaching
10 your verdict." It would result in the jurors not considering
11 most of Mr. Severt's testimony, which he's already qualified as
12 an expert. He testified about all the materials he relied on,
13 and so this jury instruction would mislead the jury.

14 MS. TALCOTT: Your Honor, plaintiff continues to
15 focus on what an expert can rely on as opposed to what the jury
16 can hear. It is not inappropriate for Mr. Severt to rely on
17 what plaintiff told him. What was inappropriate was for
18 Mr. Severt to testify in court about what plaintiff told him,
19 and even more problematic, what plaintiff told him someone else
20 told her.

21 If the Court is not inclined to strike the testimony,
22 we would ask for a limiting instruction that they cannot
23 consider the testimony of Mr. Severt gave for its truth but
24 just for the fact that he relied upon it. But here, we think
25 there needs to be a balancing test done in this case, and the

1 Court has to rule that the hearsay comes in after that
2 balancing test if this is not going to be cured.

3 MS. CHAMBERS: Judge, again, this was Mr. Severt's
4 expert opinion that was qualified by this Court. He is allowed
5 to make opinion statements.

6 MS. TALCOTT: Your Honor, I can respond. It is not
7 about opinions. It is about him repeating the hearsay
8 statements from plaintiff. That's what is objectionable,
9 because the jury's impression is that those are true.

10 THE COURT: Ms. Chambers, anything further?

11 MS. CHAMBERS: No, Judge. There is no legal support
12 for that, and the Federal Rules of Evidence are clear.

13 MS. TALCOTT: Obviously, Your Honor, we disagree;
14 that there is legal support in the Federal Rules of Evidence.

15 Thank you.

16 THE COURT: Thank you. I am going to do my own case
17 law search very quickly into this issue, and I will let you
18 folks know.

19 Moving to the second motion, any objection to
20 Plaintiff's Exhibit 1 and 182? Tell me what those are.

21 MR. MCCARTHY: Thank you, Judge. Mr. Magnuson
22 corrects us. It is a renewed objection, not a motion. I will
23 describe to you, Judge, the two exhibits at issue.

24 Exhibit 1 is a copy of an AstraZeneca annual report.
25 It is a very long document, sort of in the tradition of the

1 annual reports that public companies do. Exhibit 182 appears
2 to be an expert from AstraZeneca's website showing sales
3 figures for SYMBICORT. Now, both of these documents contain
4 references to AstraZeneca's global and U.S. revenues and
5 profits and numbers in the billions of dollars, as you might
6 expect.

7 Now, both of these exhibits, for context, were
8 initially proposed at a time when the plaintiff was trying to
9 add a claim for punitive damages, and that's not surprising,
10 because if there were a punitive damages claim, of course, the
11 jury would be entitled to know what resources AstraZeneca has.
12 Now there is not a punitive damages claim in the case.

13 There is no dispute, Your Honor, in this case that
14 AstraZeneca makes a profit. There was testimony about that
15 from almost all of the plaintiff's examinations of our
16 witnesses, and I have lost track of the number of times that
17 Mr. Oswald has said the word "profits" to the jury. It is on
18 his big board over there.

19 Your Honor, for context, this case is about a couple
20 of AstraZeneca drugs in a small part in a small region of
21 AstraZeneca's global operations. So if they are going to show
22 the jury billion-dollar figures that refer to AstraZeneca's
23 global operations and global wealth, we think there is a real
24 danger the jury is going to consider this evidence for an
25 improper purpose under Rule 403 and to properly take into

1 account AstraZeneca's wealth and think they are supposed to
2 punish the company or somehow consider the company's ability to
3 pay.

4 So we would renew our objections that were previously
5 stated to 1 and 182, for the reasons stated here and in our
6 brief filed last night.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 MS. CHAMBERS: Judge, in response to that, both of
10 these exhibits are public documents. They are on AstraZeneca
11 website, and so I don't think a 403 analysis is appropriate
12 here.

13 Also, Mr. McCarthy said these exhibits are being
14 offered to support a punitive damages claim. I mean, that is,
15 I think, AstraZeneca's position but not the plaintiff's
16 position. The sales and AstraZeneca's business has been at
17 issue in this case. It has been discussed. It is another
18 internal AstraZeneca document in terms of what the sales goals
19 are and what the sales team is trying to do. So for those
20 reasons, these documents are already in evidence, and we ask
21 that they stay in evidence.

22 MR. MCCARTHY: Your Honor, just by way of brief
23 response, the status of these documents as public documents is
24 irrelevant. In fact, Your Honor is going to instruct the jury
25 to disregard a whole host of publicly available materials that

1 are not properly within their consideration during the trial.
2 Again, we renew our objections on these two exhibits,
3 Your Honor.

4 THE COURT: Thank you. I will have both rulings
5 before nine o'clock.

6 I will retake the bench a couple of minutes before
7 9:00 before we bring in the jury so we know what to expect.

8 Anything further?

9 MR. OSWALD: Yes, Your Honor. I just wanted to be
10 clear.

11 So we will bring the jury in at nine o'clock. We
12 will go right into closing arguments; is that right?

13 THE COURT: Correct.

14 MR. OSWALD: So plaintiff will close; defendant will
15 close; we will have a rebuttal period. Then once that's done,
16 then you are going to instruct at that point; is that correct?

17 THE COURT: Yes.

18 MR. OSWALD: Will there be a break at any point?

19 THE COURT: I have to give them and Dennis a morning
20 break, and so it just sort of depends how your closings roll
21 out. I will break when it is appropriate and not break in the
22 middle of either one of your closings obviously. We will take
23 a morning recess and then keep going.

24 MR. OSWALD: Understood.

25 Then the issue -- are we going to have the exhibit

1 binders go back as well as the electronic or just the
2 electronic?

3 THE COURT: Mr. Magnuson?

4 THE CLERK: Just the electronic.

5 MR. MCCARTHY: As Ms. Riechert mentioned, we do have
6 a set of binders, I think similar to what Mr. Oswald handed to
7 the jurors. So we can hand those out whenever Your Honor
8 prefers.

9 THE COURT: I think the jury already has copies of
10 your specific exhibits.

11 MR. OSWALD: I meant the exhibit binders with all of
12 them.

13 THE COURT: I guess not. No hard copies other than
14 the exhibit binders --

15 MR. OSWALD: The jury notebooks?

16 THE COURT: The jury notebooks, yes. Everything else
17 is an e-version that will go to the jury.

18 MR. OSWALD: Understood. Okay.

19 How does that work? Usually Ms. Riechert and I will
20 get together, and we would look at the books and go through
21 them and make sure they are all right.

22 THE COURT: I know.

23 MS. RIECHERT: We are looking at thumb drives
24 instead.

25 MR. OSWALD: Then once we have done that, we sign a

1 page, and back they go. How does that work?

2 THE COURT: Mr. Magnuson.

3 THE CLERK: We will figure it out.

4 THE COURT: This is all new to us as well.

5 THE CLERK: I will have to get the machine set up
6 while you guys are doing closings. At some point I'm going to
7 have you go in there, once everything I believe is taken care
8 of the way it should be, for you guys to go through, click
9 through, I guess, and be able to verify what's on there.
10 That's the only way we can do it.

11 MR. OSWALD: Understood. Thank you, Your Honor.

12 THE COURT: Thank you very much. We are in recess.
13 So we will come back just a minute or two before 9:00.

14 Thank you.

15 (Recess.)

16 (Open court; jury not present:)

17 THE COURT: Just quickly, the two motions, Document
18 140, defendant's motion for a curative jury instruction, that's
19 denied. I find that the statements were not offered for the
20 truth; thus, avoiding any hearsay problem, and I am also
21 relying on FRE 703.

22 Defendant's renewed objections to Plaintiff's
23 Exhibits 1 and 182, Document 138, I agree that the relevance is
24 marginal; however, I don't find that those exhibits satisfy the
25 very high 403 standard in terms undue prejudice.

1 MR. McCARTHY: Judge --

2 THE COURT: Gary, will you please get the jury.

3 MR. McCARTHY: Judge, can I make a quick request? We
4 would request, in lieu of excluding Exhibits 1 and 182, we
5 prepared a very short proposed limiting instruction for the
6 jury. We would ask you to consider giving that instruction.
7 We can hand it up. We will give a copy's to plaintiff's
8 counsel.

9 MR. OSWALD: Your Honor, while we are doing that, so
10 the jury isn't confused, the defendant has placed the
11 defendant's jury notebooks on the jurors' seats. I would like
12 the Court just to say, "Hey, there is a notebook there, and
13 that's the defendant's notebook for reference during the
14 defendant's closing argument."

15 THE COURT: Okay. Let me know if there is an
16 objection to defendant's limiting instruction.

17 MR. OSWALD: Objection, Your Honor. We already have
18 a jury instruction relating to corporations getting fair
19 treatment under the law. This is simply another version of the
20 same. You're already going to instruct all that parties are
21 equal under the law.

22 MR. McCARTHY: Judge, there is a danger the jury is
23 going to understand from these exhibits or any reference to
24 them that the defendant's wealth is a relevant consideration,
25 and so we ask Your Honor to deliver that instruction.

Closing Statement

1 THE COURT: Thank you. I may attach some version of
2 this to the beginning instruction on corporations and equal
3 treatment, specifically that you are not to consider
4 defendant's wealth in determining liability or damages in this
5 case, but I want to look again at the Ninth Circuit model
6 instruction.

7 MR. McCARTHY: One additional clarification to avoid
8 any dispute in closing argument, we would object during closing
9 to any reference to "billions of dollars" or "AstraZeneca's
10 wealth." And so we ask for you to rule in limine that no such
11 mention should be made in closing statement.

12 THE COURT: So ruled.

13 Bring in the jury.

14 (Open court; jury present:)

15 THE COURT: Good morning. Welcome. Thank you for
16 returning. I hope you all had a nice weekend.

17 You will see on your chairs that there is a notebook.
18 That's a notebook prepared by defendant with some exhibits
19 selected for your information, similar to the notebook that you
20 received from plaintiff. So please have a seat.

21 Good morning.

22 Mr. Oswald.

23 MR. OSWALD: Good morning, Your Honor.

24 THE COURT: Please begin.

25 MR. OSWALD: Thank you.

Closing Statement

1 Good morning, everyone. I got to enjoy Portland's
2 wonderful weather this weekend. And on Saturday, I sat out on
3 the lawn, which is between the road and the river, watching
4 families go by on bicycles and a unicycle -- literally hundreds
5 meeting up at that fountain. And I sat there trying to get a
6 view of the mountain. And as I sat there, I just thought how
7 very lucky I was; how lucky that I'm able to bring Suzanne
8 Ivie's case to you -- to a jury.

9 Trial by jury is a privilege. It is the only thing
10 that's discussed twice in the Bill of Rights and the Sixth and
11 Seventh Amendments, the right to a jury trial. And we are the
12 only country in the world that has such a right enshrined in a
13 document like our Constitution. So it is a privilege to be
14 here to exercise that right for Suzanne.

15 The law that we've talked about and that you'll hear
16 in Judge Russo's instructions is powerful. It protects us. It
17 makes the world a better place. In this courtroom we all stand
18 equal under the law. It doesn't matter if you are an
19 individual or you're a company. Everyone must stand here and
20 face justice -- justice before jurors; justice before you.

21 You come from the community from different
22 backgrounds, from different points of view, and you sit here as
23 the conscience of the community to speak in the end with one
24 voice. The date has arrived, and that time is now.

25 AZ is a very powerful corporation, and it does much

Closing Statement

1 good. It makes medicines that make people better. But those
2 medicines that they make need to be used in the right way, and
3 that's why we are here.

4 You heard Barbara McCullough say that AstraZeneca
5 intends to launch a COVID-19 vaccine in the United States -- to
6 our friends, available to our family, available to us. That's
7 what's at stake here, because with power comes responsibility.
8 Without responsibility, there is no accountability. If there
9 is no accountability, there is no safety -- no safety for any
10 of us; no safety for employers, no safety for patients, no
11 safety for all of us collectively.

12 And AstraZeneca needs to be accountable to the laws,
13 and it makes itself accountable, as its witnesses have told
14 you, through the policies that it issues to all of its
15 employees, through its code of conduct, through, for example,
16 Rule No. 1: AstraZeneca must market its products only for
17 their approved uses. That's what is at stake here in our case.

18 Suzanne told you what the potential consequence of
19 violating this rule is if DALIRESP is prescribed for those who
20 suffer anxiety and depression. It can make actually people who
21 have anxiety and depression suicidal. When it is marketed for
22 depression and anxiety, it can do the opposite. It can tip
23 those on the scale -- those very close to the edge -- to take a
24 reckless act. To market this for anything but an approved use
25 is reckless, and it is dangerous.

Closing Statement

1 So AstraZeneca has a system, and it has a system,
2 when it is working, where commercial business directors, those
3 like Stephani DiNunzio, are accountable and responsible. But
4 we heard Mike Pomponi say on our screens that when he
5 interviewed Stephani DiNunzio, she took no responsibility for
6 what her reps were telling doctors who then prescribed to
7 patients. "That's their accountability," Stephani DiNunzio
8 told Mike Pomponi, "not mine."

9 DiNunzio says that her view of what is off-label is
10 better than her compliance department's view of what is
11 off-label. Remember that I asked -- I read the statement from
12 the May 21st compliance report, the one that said it was
13 off-label. And what did she say? "That is in line with the
14 U.S. label," she said. "It is not off-label. It is perfectly
15 fine to use."

16 Someone with this level of arrogance is breathtaking,
17 but it is not unforeseeable at a big company -- a big company
18 like AstraZeneca. That's why companies have rules. That's why
19 all employees must follow those rules. As Barbara McCullough
20 said, "If you see something, say something. Speak up. And
21 what will happen is we will protect you."

22 She told us, "It is AstraZeneca's responsibility to
23 prevent its managers from retaliating against employees who
24 report concerns about the company marketing its products for
25 unapproved uses; and that it was the company's commitment to

Closing Statement

1 protect employees from retaliation when they report in good
2 faith concerns about the company marketing drugs for unapproved
3 uses. If you see something, say something, and we will protect
4 you," McCullough says.

5 But when Mike Pomponi goes to investigate Suzanne's
6 complaints, what he finds is that the workforce underneath
7 Stephani DiNunzio doesn't feel that they can speak up; that it
8 is not a safe environment. In fact, he finds that DiNunzio has
9 retaliated against others. In fact, if one spoke up, if one
10 were to ask questions, they would be accused of having a fixed
11 mindset, and that they would have to leave the company.

12 So companies create support systems to protect
13 employees. Having DiNunzios in your workforce is entirely
14 foreseeable. Having employees in the workforce who will put
15 profits over patients is entirely foreseeable in the workforce,
16 and so a company like AstraZeneca has policies and individuals,
17 guardians of those rules, who protect employees in the
18 workplace. People like Karen Belknap, Dawn Ceaser,
19 Mike Pomponi, and Barbara McCullough.

20 So the first line of defense is Karen Belknap. She
21 is hopelessly conflicted. She is investigating Suzanne at the
22 same time she is investigating Suzanne's complaints. Now,
23 either she can't see the problem in that through her 150 annual
24 caseload, or she can't see it because she let her HR
25 certification lapse 15 years before, the one that requires

Closing Statement

1 annual training to keep up her skills.

2 And what did she say? She said that it was routine
3 for a manager to have an employee in a disciplinary meeting
4 where the manager has a complaint of retaliation against that
5 manager. Underperforming employees, she says, file complaints.
6 For her, complaints about compliance are seen as defiance.
7 It's her playbook.

8 Remember, Larry Hinson told you: "They make it about
9 behaviors; it's a dog whistle." DiNunzio tells --
10 then executes that playbook. She uses coaching reports. She
11 delves deeply into them. She surprises the employee with a
12 write-up, and then she tells them, "You have a choice. You
13 have a choice between the write-up, which will permit you to go
14 no higher than a three in that year's performance evaluation,
15 cut your bonus by 25 percent, and be a scarlet letter in your
16 file for the rest of your AstraZeneca career, or you can sign
17 the package, the package that includes a release of claims."
18 And then the employee simply goes away.

19 But Suzanne, when presented with this choice,
20 surprises Belknap. For Suzanne, patients really do matter.
21 Belknap sees Suzanne not taking the release, not signing the
22 release of claims, as a sign of insubordination. She is more
23 concerned about how this will land with DiNunzio than being a
24 proper guardian of the system of protection.

25 Then Belknap ratchets up the pressure: No virtual

Closing Statement

1 field coaching for Suzanne and stripping Suzanne, on
2 April 17th, of Suzanne's compliance role. She abdicates her
3 responsibility as a guardian of the system to protect employees
4 from retaliation.

5 And then on May 3rd, here, the very last day that she
6 works at AstraZeneca, she tells Suzanne, "Don't come back to
7 HR, because if you come back to HR, I'm going to simply send
8 you back to Stephani DiNunzio. Go to DiNunzio. Go to Gray.
9 Don't come to us."

10 Dawn Ceaser picks up the baton on May 3rd, 2019, and
11 she takes what DiNunzio is giving hook, line, and sinker. No
12 opportunity to respond for Suzanne, in violation of
13 AstraZeneca's own rules. No opportunity to respond to
14 DiNunzio's allegation that Suzanne has done little work.

15 Then remarkably, Dawn Ceaser joins in the
16 retaliation. She writes in the employee relations case for
17 terminating Suzanne that they are firing Suzanne because
18 "Suzanne is not accepting the results of the investigations
19 that have occurred and continues to raise similar complaints."
20 Barb McCullough says that this should have never happened; that
21 an employee always has the right to complain. But not for
22 Belknap and not for Dawn Ceaser.

23 But there is another line of defense, and that line
24 of defense is compliance: Mike Pomponi, here, and Barbara
25 McCullough. They are on all of the emails; all of the

Closing Statement

1 complaints. You'll see them in evidence. Every complaint has
2 Barbara McCullough and Mike Pomponi, and they know that Suzanne
3 is complaining about what DiNunzio is doing as far back as
4 August of 2018, and they understand the consequence of what it
5 is that Suzanne is saying. Remember what Mike Pomponi said?
6 The only way that AstraZeneca escaped the corporate integrity
7 agreement the first time on the off-label marketing, the first
8 time, was to enter into a corporate integrity agreement with
9 the Department of Health and Human Services. And DiNunzio
10 tells us that violating a CIA has consequences. Those
11 consequences are massive.

12 This is what Pomponi knows: "But on May 16th, here,
13 when Suzanne reaches out to him for help, Pomponi says, 'I'll
14 get back to you.'" But he doesn't. He forwards Suzanne's 5-16
15 complaint directly to HR, and DiNunzio finds out, again, just
16 days later, that Suzanne has complained about her. Pomponi
17 simply looks the other way. Worse, Amy Welch told us at the
18 very end that Pomponi helps in preparing the June 6th, 2019,
19 employee relations case for termination.

20 The last guardian at AstraZeneca is Barbara
21 McCullough, the vice president of North America compliance,
22 responsible for compliance for the Bio-Pharma Unit for the
23 entire United States. Remember what she told us? The
24 compliance buck stops with her. And yet what is she really
25 concerned about? Well, first, she reports this all to

Closing Statement

1 AstraZeneca's top business unit members, Mina Makar and
2 Ruud Dobber, and then instead of being concerned about the
3 things that she should be concerned about, for instance,
4 DiNunzio's insights not being in line with the U.S. label; that
5 compliance had recommended that DiNunzio be retrained and
6 monitored; that field reports had not been recorded or
7 consistently enforced; and that Suzanne is saying she is being
8 fired for retaliatory reasons -- these are the things that she
9 should be concerned about. But what she is actually concerned
10 about is whether Suzanne signs the release of claims, whether
11 she has accepted it, four days after AstraZeneca has already
12 fired Suzanne.

13 So that is the last line of defense, at least the
14 last line of defense at AstraZeneca for its bad system. There
15 is another line of defense. And that line of defense is you,
16 in this courtroom, where AstraZeneca can be forced to take
17 responsibility and held accountable for its actions. You can
18 fix what happened here, and by your verdict you can help
19 AstraZeneca fix its own bad system for its current employees,
20 for its future employees, for its patients, for all of us.

21 Now, there are three sets of claims in this case that
22 I want to tell you about, and you are going to see them in the
23 jury instructions that Judge Russo is going to pass out at the
24 conclusion of all of the closing arguments. The first is under
25 the False Claims Act -- a set of claims -- and the Oregon

Closing Statement

1 whistleblower protection law.

2 Now, there are three elements that we need to show.
3 The first is that Suzanne Ivie engaged in what the law calls
4 protected conduct. And the defendant doesn't contest this.
5 Suzanne Ivie engaged in protected conduct on August 31st, when
6 she notified compliance about her concerns about the insights.

7 She engaged in protected conduct, again, on the
8 17th of December, here, when she says, "Look, I'm not going to
9 do this anymore. I am willing to win, but I want to win the
10 right way. What you're doing here is illegal," right before
11 DiNunzio gives her a poor review.

12 She does again on the 19th of December here, when she
13 files a complaint with compliance. On January 15th, 2019, when
14 she is interviewed by compliance. Again, on February 5th,
15 2019, when she files her second complaint. And then finally,
16 on the 16th of May, here, when she goes to compliance the last
17 time for help.

18 And AstraZeneca engaged in adverse actions. Those
19 adverse actions included, of course, the firing on June 6th,
20 but also the written warning on March 1st and the stripping of
21 her duties, her compliance duties, and ratcheting up the
22 pressure on April 17th.

23 So what this case comes down to on the False Claims
24 Act and on the Oregon Whistleblower Protection Act is
25 causation. But what is causation?

Closing Statement

1 What you'll see is that it says "because of." She
2 was fired "because of" her protected conduct; that her firing
3 was the "but for" cause of the termination. But what is that?

4 I like to think of it in terms of a grocery list. So
5 I have a grocery list. I put things on it, and then I use that
6 when I go to the store. If it is something that is on my list,
7 even if it is one of many, as long as it is a thing that takes
8 me to the store, that is "but for" causation. In this example,
9 as long as it is sugar that takes me to the store, then I've
10 met a "but for" cause for going to the store.

11 Causation can be shown through a quick reaction by an
12 employer to an employee's protected conduct, an action by the
13 employee, a reaction, a retaliation by the employer in quick
14 succession, and we have that here.

15 First, on August 31st, right after Suzanne forwards
16 DiNunzio's email to compliance, DiNunzio says, "Let's pause on
17 this." Remember what Suzanne says immediately thereafter?
18 DiNunzio picks up the telephone, and she is angry at Suzanne
19 for going you outside the group; that she doesn't understand
20 what it means to make a profit.

21 On the 17th of December, when she sends the warning
22 shot, remember, Suzanne says, "I'm not going to be sneaking
23 around on this anymore. I'm not going to do this. This is
24 illegal." And right after, DiNunzio hands her the performance
25 evaluation with the one or the two.

Closing Statement

1 On the 7th of February, DiNunzio files a report. It
2 becomes the complaint that leads to a written warning. Two
3 days after Suzanne files her complaint, on February 5th -- and,
4 of course, the timing, the same day, just three weeks before,
5 here, when Pomponi from compliance is interviewing Suzanne --
6 interviews Suzanne with Belknap in the morning -- DiNunzio is
7 writing up her case against Suzanne, taking that entire day on
8 the 5th to prepare.

9 Next, March 1st, 2019. Why were they so concerned
10 about how Stephani DiNunzio would take the fact that on the
11 25th Suzanne didn't take the package; didn't sign the release
12 of claims. It's because DiNunzio was scheduled to be
13 interviewed on March 1st, 2019, and that report was going to go
14 to the highest levels of AstraZeneca, potentially up the chain
15 to Mina Makar or even Ruud Dobber.

16 And you remember how Stephani DiNunzio talked about
17 Ruud Dobber; about how she felt about that meeting that she had
18 with him; how she prepared. This was not the way that she
19 wanted to be introduced to him. That's why HR was worried
20 about how Stephani would take the fact that Suzanne did not
21 sign the package. The interview had to go forward.

22 Then, of course, the effective date of the written
23 warning is exactly the same day, March 1st, 2019. In May, more
24 of the same. On May 16th, Suzanne Ivie goes to the compliance
25 department. This is her request for help. Rather than

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1 responding to Suzanne, Mike Pomponi sends it on to HR and that
2 very day DiNunzio and HR files their second complaint against
3 Suzanne. And then, of course, in the June 6th, 2019, the
4 employee relations case for termination, Dawn Ceaser doesn't
5 hide the ball. She tells us exactly why AstraZeneca is firing
6 Suzanne. She is firing Suzanne for not accepting the results
7 of the investigations, and that's even though, on the 21st of
8 May, Suzanne was proved right.

9 There were at least two statements that DiNunzio was
10 distributing amongst her staff, amongst her PSSs, that were not
11 in line with the U.S. label. But, of course, DiNunzio doesn't
12 know. She never even saw the report. No one even ever told
13 her, "Hey, you've got to be retrained and monitored."

14 Now, the Oregon whistleblower protection law mimics
15 the federal False Claims Act --

16 THE COURT: Mr. Oswald, I'm sorry to interrupt you.
17 Apparently folks are having trouble hearing in the overflow
18 courtroom.

19 MR. OSWALD: I'll speak up.

20 THE COURT: Can you move the lecturn?

21 MR. OSWALD: I will.

22 The Oregon whistleblower protection law mimics the
23 False Claims Act. A violation of one is a violation of the
24 other.

25 Now, the next set of claims are under the Family and

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1 Medical Leave Act and the Oregon Family Leave Act. The causal
2 connection here, like you saw with the grocery list, all that
3 needs to happen is one factor. And again, timing is really
4 what we look at first. And, boy, the timing couldn't be
5 closer. On the very day that Suzanne returns from her leave,
6 what happens? DiNunzio strips her of her compliance ambassador
7 role and institutes an in-field coaching of 100 percent --
8 different from any of the other of her peers.

9 Next, we have the Age Discrimination in Employment
10 Act and the Oregon Age Discrimination in Employment Act. Here,
11 the causation is the same. But what's important that we look
12 at is, again, the timing of the actions that happened as a
13 result of her complaint.

14 Of course, we know that there is a direct comparator,
15 Andrew Maratas, her peer. Andrew Maratas is put on a
16 performance improvement plan for inadequacies in his coaching.
17 Suzanne Ivie, who is the oldest, she is written up and fired.

18 Now, to the timing. Suzanne makes her complaint for
19 the first time that her boss is treating her differently
20 because of her age on December 19th; here on our timeline.
21 Then a slew of retaliatory actions happen thereafter.

22 On January 15th, on 2-7, on 2-18, that's when they
23 meet with Suzanne to ambush her and ask her about her field
24 coaching. On 3-1, here, on our timeline; March 1st; on
25 April 17th; on May 3rd; on May 16th, when Dawn Ceaser files the

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1 second complaint against Suzanne; and, of course, the firing
2 itself on June 6th.

3 Now, you'll see an instruction on willfulness.
4 Willfulness, under the Age Discrimination in Employment Act is
5 simply that the employer either knew of their obligations under
6 the Act or did not know but were in reckless disregard of their
7 obligations. DiNunzio understood that it was unlawful to treat
8 someone differently because of their age; so did Belknap; and
9 so did Ceaser. Yet they did nothing to stop DiNunzio.

10 Now, AstraZeneca will attempt and has attempted to
11 distract you with something they call the 80/20 field virtual
12 split. If this were, in fact, a requirement, why is it in no
13 HR handbook? Why is it in no code of ethics? The only thing
14 that they have shown you that has come from AstraZeneca itself,
15 the only thing is a Frequently Asked Questions attachment to an
16 email from April of 2018. That's it.

17 And remember that DiNunzio met with Suzanne
18 frequently during her tenure; Suzanne says almost every week.
19 And DiNunzio talked to us and said she reviewed the coaching
20 reports on a monthly basis. She reviewed the expense reports
21 on a weekly basis. If this were so important to DiNunzio
22 before the 15th of January, when she knows as of the 9th,
23 because HR has notified her boss that there had been a
24 complaint filed against her, and she can guess who it is, if
25 this were so important, why wouldn't DiNunzio put that

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1 somewhere in Suzanne's 2018 year-end review that she says she
2 gave to Suzanne? Take a look at this. You will note that
3 there is not one mention of field versus virtual coaching; not
4 one mention of the 80/20 split -- nothing.

5 What is clear is that on the 15th, when DiNunzio
6 finds out about Suzanne's complaint, as of the 9th, she takes
7 out the playbook. It is Karen Belknap's playbook. She does a
8 deep dive into Suzanne's coaching reports. That's why it takes
9 her that entire day. That's what she needs to do, because what
10 she knows is that Suzanne's performance up to that point has
11 been exemplary. Suzanne was No. 3 in the nation in 2016, the
12 top 2 percent. Suzanne was No. 2 in the nation, top 1 percent.
13 And you'll have in the jury room every one of Suzanne's
14 evaluations, indeed her entire employment file. Take a look.
15 See what Stephani DiNunzio said about her in 2017; what
16 previous managers have said about her work before that point.

17 So this is what they settle upon; this is what they
18 ambush Suzanne on the 18th of February about when she thinks
19 they are there to talk about her complaints about off-label
20 marketing to get it all worked out. They ambush her. But
21 Suzanne is not on trial here. AstraZeneca is on trial, and
22 AstraZeneca retaliated against Suzanne on March 1st, 2019.
23 They retaliated against her on June 6th, 2019. And they are
24 continuing to retaliate against her to this very day.

25 They traipse these poor subordinates, who are

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1 beholden to AstraZeneca, to come before you and to sully
2 Suzanne, to say, "Oh, she wasn't a very good coach. She met me
3 at the coffee shop." AstraZeneca takes no responsibility for
4 its actions. And without responsibility, there is no
5 accountability.

6 The only thing that has happened in this case, the
7 only thing is that DiNunzio gets rewarded with a promotion --
8 no retraining, no monitoring, no notice at all. She is
9 promoted into a new position where she is likely to do it
10 again, but not if you speak with one voice, as a conscience of
11 the community, to tell AstraZeneca that they need to take
12 responsibility. They need to be accountable for their actions.

13 You are the last line of defense. And you will have
14 the opportunity, as part of being that last line, to compensate
15 Suzanne for what AstraZeneca took away from her. When you go
16 back into the jury room, you will see Exhibits 2, 3, and 4.
17 One of those exhibits is Dr. Edelman's calculation of Suzanne's
18 backpay. The amount of pay that AstraZeneca took away from her
19 between the date of her firing on the 6th of June up through
20 the first day of trial. And I ask you to compensate Suzanne
21 under that line of backpay in the amount of \$575,982. This
22 will be in the documents that you will have. Remember that
23 since Suzanne's firing, she has interviewed for 149 jobs; many
24 in the pharma field. She has gotten a first interview on a few
25 but never a second interview.

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1 Remember what Scott Severt said from the stand: "She
2 will likely never work in pharma again." That is what
3 AstraZeneca has taken away from her. Thus, when you get to the
4 line that says front pay, the amount of pay between the first
5 day of trial and the end of her work life at 65 years old, I
6 ask you to compensate her in the amount of \$3,005,021. This
7 will be in your jury book that you have.

8 Now I want you to look at the verdict form. When you
9 go back into the jury room, in addition to the exhibits, you
10 will have a verdict sheet that Judge Russo will give you. I
11 want to walk you through this.

12 "Question No. 1. Claim for False Claims Act
13 retaliation:

14 "Did the plaintiff prove by a preponderance of the
15 evidence that defendant terminated plaintiff because she
16 complained about her manager's alleged encouragement of
17 off-label marketing; that is, that defendant would not have
18 terminated plaintiff but for that complaint?"

19 Remember the grocery list.

20 I ask you to check "yes" in answer to Question No. 1.

21 "Question No. 2. Claim for Oregon Whistleblower Law
22 Protection/retaliation.

23 "Did the plaintiff prove by a preponderance of the
24 evidence that defendant terminated plaintiff because she made a
25 good-faith report of conduct by defendant that she believed to

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1 be a violation of a state or federal law, rule, or regulation;
2 that is, the plaintiff's report made a difference in
3 defendant's decision to terminate plaintiff?"

4 I ask that you check "yes" on Question No. 2.

5 "Question No. 3. Claim for Age Discrimination in
6 Employment Act, ADEA/discrimination.

7 "Did the plaintiff prove by a preponderance of the
8 evidence that the defendant terminated plaintiff because of her
9 age?"

10 Remember, sugar, on the grocery list.

11 "That is, the defendant would not have terminated the
12 plaintiff but for her age."

13 I ask that you answer "yes" to Question No. 3 on the
14 verdict form.

15 "Question No. 4. Claim for ADEA, Age Discrimination
16 in Employment Act/retaliation.

17 "Did the plaintiff prove by a preponderance of the
18 evidence that defendant terminated the plaintiff because she
19 complained to defendant that she had been discriminated against
20 based on her age; that is, that defendant would not have
21 terminated the plaintiff but for her complaint?"

22 Again, sugar, on the grocery list.

23 I ask that you answer "yes" to Question No. 4.

24 I'm going to skip down to 12, because this is where
25 we deal with age discrimination/willfulness,

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1 "ADEA/willfulness. Did the plaintiff prove by a
2 preponderance of the evidence that the defendant knew or showed
3 reckless disregard for whether the plaintiff's termination was
4 prohibited by the ADEA?"

5 I ask that you answer "yes" to Question No. 12.

6 Now, back to Question No. 5.

7 "Claim for Family and Medical Leave Act, FMLA; Oregon
8 Family Medical Leave Act, retaliation/discrimination.

9 "Did the plaintiff prove by a preponderance of the
10 evidence that plaintiff's medical leave was a negative factor
11 in the defendant's decision to terminate her employment?"

12 I ask that you answer "yes" to Question No. 5.

13 "Question No. 6. Claim for state law employment
14 discrimination.

15 "Did plaintiff prove that plaintiff's age was a
16 substantial factor in the defendant's decision to terminate the
17 plaintiff; that is, the defendant would not have terminated the
18 plaintiff but for her age?"

19 Again, as with the ADEA claim, the federal claim,
20 think of the grocery list, sugar on the list, and I ask that
21 you answer "yes" to Question No. 6.

22 And then you'll come to Question No. 7.

23 "Economic damages; backpay. What lost wages and
24 benefits, if any, did plaintiff prove by a preponderance of the
25 evidence that she sustained as a result of defendant's unlawful

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1 actions?"

2 The amount of loss of pay and benefits from the date
3 of firing up through the first day of trial, consistent with
4 Dr. Edelman's calculation, I ask that you insert "\$575,982" in
5 response to Question No. 7

6 "Economic damages, front pay. What lost wages and
7 benefits, if any, did the plaintiff prove by a preponderance of
8 the evidence that she would have earned had her employment not
9 been terminated as a result of defendant's unlawful action for
10 the period from the date of your verdict until the date when
11 the plaintiff would have voluntarily resigned, retired, or
12 obtained other employment?"

13 This is the front pay figure that Dr. Edelman
14 calculated for us. I ask you insert "\$3,005,021" in response
15 to Question No. 8.

16 I want to turn down to Question No. 10.

17 "Mitigation of all damages. Did defendant prove by a
18 preponderance of the evidence that plaintiff failed to use
19 reasonable efforts to mitigate her damages?"

20 Remember, all of her job interviews -- in pharma and
21 out of pharma; all of her applications for employment; and
22 indeed finding a job that will turn into a full-time job on
23 August 1st.

24 I ask that you answer "no" to this question on
25 Question No. 10.

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1 Under question 11, "By what amount, if any, should
2 plaintiff's damages be reduced because she failed to mitigate
3 her damages," I ask that you insert "none."

4 So now let's turn to Question No. 9.

5 "Non-economic damages, emotional distress, suffering,
6 and reputational harm. What damages for emotional distress,
7 suffering, or reputation harm, if any, did plaintiff prove by a
8 preponderance of the evidence that she sustained as a result of
9 defendant's unlawful actions?"

10 I ask that you insert "2,102,400" in this section.

11 How did I get there? Well, remember the testimony
12 from Suzanne and from others that her migraines increased in
13 frequency and in severity. Her doctor has diagnosed her with
14 anxiety and depression, giving her medication for both. First,
15 not attending basketball games, as she once did. And when she
16 did attend basketball games, popping Tums to get through it.

17 The diminished joy of long-time friendships. We
18 don't live our lives in chunks of time. We live minute by
19 minute. We live hour by hour. How much time is left before
20 lunch? How many hours before the game starts? How many hours
21 before the kids get home from school? Or the grandkids come
22 home to visit? How many hours before the kids leave?

23 This is important. Think of it this way, because
24 what AstraZeneca did was not a one-time event. It affects
25 Suzanne for the rest of her life. It's not going away, and

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1 it's not going to get better with time.

2 Dr. Edelman has indicated that Suzanne can expect at
3 least 12 more years of work life until age 65. We don't get to
4 come back in two years or five years or ten years and do it
5 again. We don't get to update our assessment. This is it for
6 Suzanne. This is her one day in court.

7 Given the magnitude of the career-altering impact
8 here, I ask you award 2,102,400. That amounts to \$30 an hour,
9 using just her waking hours between now and the end of her work
10 life over that 12 years. If this had happened at age 62, we
11 would be talking about less, but it didn't happen at age 62.
12 It happened age 53.

13 So \$30 an hour for each working hour through the end
14 of her work life. Who can argue with that? And imagine what
15 would happen if you were to do it any differently? AstraZeneca
16 would learn nothing. Remember what Ms. Belknap and
17 Ms. Ceaser's testimony was? They said that if they were given
18 the opportunity, they would change nothing -- they would do
19 nothing differently. AstraZeneca would be rewarded for firing
20 Suzanne and for promoting DiNunzio. You can't let that happen.
21 I'm confident that you won't let that happen; that you will
22 speak with one voice, as the conscience of the community, to
23 protect Suzanne, to protect AstraZeneca's current employees, to
24 protect AstraZeneca's future employees, and to protect all of
25 us.

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1 Thank you.

2 THE COURT: Thank you. I will have counsel take a
3 quick ten-minute recess.

4 Thank you, ladies and gentlemen of the jury. Ten
5 minutes. Then we will come back in the box, and defendant will
6 commence their closing.

7 Thank you.

8 (Recess.)

9 (Open court; jury present:)

10 THE COURT: Thank you.

11 MS. RIECHERT: Mr. Oswald argues that this case is
12 about safety. This case has nothing to do with safety. The
13 issue in this case is why was Ms. Ivie terminated? Ms. Ivie
14 was terminated because she was not doing her job. In fact, she
15 hadn't been doing it for a while. The sales representatives
16 who came in on Friday told you that.

17 So what changed? Two things happened: In 2017, the
18 company instituted the 80/20 rule requiring that all DSMs spend
19 80 percent of their time coaching in the field. Now, this was
20 a very important rule for AstraZeneca, because it decided that
21 coaching reps in the field was the best way to help them
22 succeed. Observing the reps as they interacted with the
23 doctors was the best way to provide constructive feedback on
24 how they could improve. The company wanted to be sure that the
25 DSMs were spending most of their time in the field with the

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1 reps coaching them.

2 The second thing that changed, besides the 80/20
3 rule, occurred at almost the same time. Things were changing
4 in Ms. Ivie's district, and selling products, AstraZeneca's
5 products, was becoming much harder. As you heard, generics and
6 competitors were entering the market. They were becoming more
7 popular. Then that big healthcare provider in the Salt Lake
8 City region, the biggest healthcare provider, SelectHealth,
9 added some other products to their formulary for patients with
10 asthma. That meant that doctors could write for prescriptions
11 other than SYMBICORT. Simply put: Things started changing in
12 the company, and those changes had nothing to do with
13 Ms. DiNunzio.

14 Now, Ms. DiNunzio has admitted that she did not
15 comply with the 80/20 rule. She wants you to believe that she
16 was fired for making complaints. She wants you to ignore the
17 fact that she refused to follow the clear requirements of the
18 job. She wants you to believe that somehow the meritless
19 complaints were the reason she was fired. The law does not
20 permit employees who are not meeting expectations from being
21 fired just because they made complaints.

22 Just because an employee makes the complaint does not
23 mean the employee can't be fired. The employee still has to do
24 her job. If you conclude, as the evidence has shown, that
25 Ms. Ivie did not do her job, and that's why she was fired, then

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1 you should decide this case in favor of AstraZeneca. So how do
2 we know that Ms. Ivie was fired for not doing her job? First,
3 she admits that she didn't spend 80 percent of her time in the
4 field coaching her team throughout the time that she worked for
5 Ms. DiNunzio.

6 When you're deliberating -- and I have a binder of
7 exhibits for you. I'm going to mention the numbers so you can
8 refer to them in the binder. If you want to take notes, that's
9 fine with me. I'm not going to go through all the exhibits.
10 Believe me, there are hundreds of exhibits in this case, but we
11 each have picked out the ones that are most important for you.

12 While you are deliberating look, look at
13 Exhibit 56 -- look at Exhibit 506. That's the written warning
14 that Ms. Ivie received in March of 2019, making it clear what
15 the job requirements were. Even after she returned from leave
16 on April 16th, she still didn't do what she was supposed to do.
17 She was still not coaching her team in the field, as
18 AstraZeneca's rules require. Those rules were applicable to
19 all district sales managers, not just Ms. Ivie.

20 Look at Exhibit 92, those are the notes of the
21 meeting on June 3rd, 2019, right before Ms. Ivie was let go.
22 In those notes, she admits she was out of sync and out of whack
23 with the rest of her team regarding field coaching. In that
24 same time, after she returned from her leave, she was canceling
25 one-on-one meetings with Ms. DiNunzio. When she did show up,

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1 she was unprepared and did not know the business strategy.
2 That's Exhibit 95. She was refusing to communicate with her
3 manager, even after Dawn Ceaser tried to set up a mediation
4 between them. That's in Exhibit 57. Ms. Ivie admitted that
5 she had lost trust in her manager. The team was not receiving
6 the coaching that they needed.

7 Now, remember, the same rule applied to all the DSMs.
8 All the other DSMs understood it. All the other DSMs followed
9 it. Not one single witness other than Ms. Ivie came into court
10 to tell you that they didn't understand the rule and that they
11 didn't comply with it.

12 Now, the evidence is also clear that Ms. Ivie knew
13 about the rule but chose not to follow it. Look at the
14 exhibits -- Exhibit 522. That's that April 4th email that we
15 showed you many times -- April 4th, 2018. That's the email
16 from Ms. DiNunzio, including Ms. Ivie. Ms. Ivie admits she got
17 it; she read it.

18 Attached to that is that FAQ that described the
19 difference of coaching with customer engagement and coaching
20 without customer engagement and said they had to spend no more
21 than 20 percent of their time coaching without customer
22 engagement.

23 Now, Mr. Oswald argues if it is not in the employee
24 handbook, if it is not in the code of conduct, employees don't
25 have to do it. This is a rule just for the salespeople. Not

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1 everything your boss tells you you have to do has to be in the
2 code of conduct. If the boss tells you to write a report, you
3 have to write a report, even though the code of conduct doesn't
4 say so. If the boss tells you to go to a meeting, and you
5 don't go to a meeting, you still have to go to the meeting,
6 even if the handbook doesn't tell you that you have to do so.
7 You have to do what your boss tells you to do.

8 Look at Exhibit 520. That's the May 29th email to
9 all of the DSMs, including Ms. Ivie. Again, Ms. Ivie didn't
10 dispute that she read it; that she received it. Again,
11 Ms. DiNunzio describes the difference between coaching with and
12 without customer engagement. And at the end of it, she says,
13 "Please review the attachments and ensure that your time
14 reflects the 80/20 split going forward."

15 Now, let's look at Exhibit 504. That's
16 Ms. DiNunzio's notes of her meeting with Ms. Ivie on June 15th.
17 Ms. Ivie did not dispute the accuracy of these notes. And as
18 the notes show, at that meeting Ms. Ivie admits that she was
19 told that she was not to use field coaching reports to capture
20 distance coaching even though she admits that she had been
21 doing that. As these notes show, Ms. DiNunzio specifically
22 told Ms. Ivie on June 15th, 2018, that she was not to use field
23 coaching reports for conversations except for Spokane.

24 Look at Exhibit 507. That's the December 18th, 2018,
25 email from Ms. DiNunzio to Ms. Ivie in which she points out for

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1 the first three-quarters of 2018 that Ms. Ivie was only
2 coaching 48 to 53 percent of the time with customer engagement.
3 Again, Ms. DiNunzio attaches those same FAQs, telling her that
4 she is not to spend more than 20 percent of her time coaching
5 without customer engagement.

6 Ms. Ivie did not dispute any of the numbers in this
7 email, because she couldn't. All of these documents show that
8 Ms. Ivie knew she was supposed to be compliant with the 80/20
9 rule, and she was not doing so.

10 You should look at Ms. Ivie's review. That's
11 Exhibit 510, which Ms. DiNunzio showed Ms. Ivie when they met
12 on December 19th. This is really important. All of these
13 documents occurred before Ms. Ivie made any complaints of
14 off-label marketing or age discrimination. Keep that in mind
15 when you're deliberating regarding the reason she was
16 terminated.

17 You can't dispute that all of these issues were on
18 the table before any of the alleged complaints of Ms. Ivie;
19 that the complaints that she said were the reason for the
20 termination. So all of these exhibits, all of these documents,
21 were already on the table before Ms. Ivie makes any complaint
22 of off-label marketing on December 19th.

23 The timeline in this case is very important. You
24 should look at the fact that it was not until immediately after
25 Ms. DiNunzio and Ms. Ivie had that review meeting in which

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1 Ms. DiNunzio told Ms. Ivie, "You're not meeting expectations;
2 I'm going to give you a one or two on your review," it was
3 immediately after that that Ms. Ivie files her complaint with
4 the ethics line. Think of the timing of that. She gets a bad
5 review, and immediately afterwards she raises a complaint for
6 the first time. The sequence of events is very telling.

7 Now, let's look at the documents that Ms. DiNunzio
8 created after the complaint was filed but before she knew about
9 the complaint. Exhibits 5 and 6 are the January 15th emails in
10 which Ms. DiNunzio details to Ms. Belknap all the time she has
11 told Ms. Ivie to comply with the 80/20 rule and the fact that
12 she wasn't doing it, wasn't going on field rides with her team,
13 and that she was falsifying her field coaching reports.

14 Then look at Exhibit 91, page 3. Those are
15 Ms. Belknap's notes of her meeting with Ms. DiNunzio on
16 February 7th, 2019.

17 Look at Exhibit 23. Those are the exhibits
18 Ms. DiNunzio prepared for her meeting with Ms. Ivie on the
19 18th. This, too, was before Ms. DiNunzio knew anything of any
20 complaint.

21 Look at page 3 of Exhibit 91. Those are the notes of
22 the meeting with Ms. DiNunzio and Ms. Ivie on February 18th.
23 Look at the admissions that Ms. Ivie makes in these notes,
24 which are not in dispute.

25 Look at Exhibits 502 and 503. Those are

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1 Ms. DiNunzio's emails after that meeting on the 18th of
2 February, refuting the allegations that Ms. Ivie had made
3 during that meeting.

4 So the evidence is undisputed that these documents
5 were all written before Ms. DiNunzio even learns that there is
6 a complaint against her.

7 Ms. DiNunzio first learns of the complaint on
8 February 21st, 2019. All of the witnesses said that. There
9 was not one single witness who said that she knew about it
10 earlier.

11 Mr. Oswald argues that her boss knew about it,
12 Mike Hartman, but there is no evidence that Mike Hartman ever
13 told Ms. DiNunzio about the complaint.

14 In fact, if you look at the 2-21 text messages --
15 that's Exhibit 96 -- those text messages are the ones that show
16 that was the day that Ms. Belknap tells Ms. DiNunzio about the
17 complaint. In those text messages, Ms. DiNunzio says, "Does
18 Mike know," meaning does Mike Hartman know about this complaint
19 against me? If, as Mr. Oswald theorizes that Mr. Hartman had
20 already told her about the complaint, she would have never put
21 that in the text message at the time, because she would know
22 that Mike Hartman knew about the complaint.

23 So DiNunzio does not learn about the complaint until
24 February 21, three days after that February 18th meeting. And
25 even then Ms. DiNunzio didn't know who made the complaint. She

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1 didn't know that Ms. Ivie was the one who made the complaint
2 until she was interviewed on March 1st, 2019.

3 So the timeline does not support Ms. Ivie's claim
4 that Ms. DiNunzio retaliated against her. It's not possible to
5 retaliate if you don't know about the complaint. Ms. DiNunzio
6 did not know about the complaint until February 21st, and
7 everything she did before that -- to document her concerns
8 about Ms. Ivie -- all of that occurred before she knew of the
9 complaint and could not have been retaliatory for that reason.

10 So what are Ms. Ivie's excuses for not complying with
11 the 80/20 rule? First, she said she didn't realize it was a
12 requirement. But the documents in this case show that she did
13 know it was a requirement -- the ones I've already gone through
14 with you -- these emails in April and May and June and December
15 all show that she knew that it was a requirement.

16 And witnesses came into court and told you that it
17 was a requirement, and they knew it. Ms. Ivie talks about
18 Andrew Maratas, who got a PIP instead of a written warning.
19 But remember, all of the witnesses talked about the discipline
20 track and the performance track. Ms. Ivie was on the
21 discipline track, because she wasn't doing what she was told to
22 do. That results in a written warning. Mr. Maratas was on the
23 performance track. He was going out into the field coaching
24 his people. He just wasn't doing it well enough. That's the
25 performance track. That's how we get a performance improvement

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1 plan. You don't get both. You get one or the other. Ms. Ivie
2 was on the discipline track; she got the warning. Mr. Maratas
3 was on the performance track; he got the PIP.

4 Mr. Oswald argues that Ms. Ivie was not in the
5 interviews that Ms. Belknap and Mr. Pomponi did of her
6 complaint, yet Ms. DiNunzio was in the meeting with Ms. Ivie to
7 discuss Ms. DiNunzio's concerns about the coaching
8 requirements. But it's typical to have a manager in a meeting
9 when you're talking about an employee's performance concerns.
10 The HR person doesn't know what those concerns are. So
11 obviously you need the manager in the meeting to go through the
12 concerns that the employee had -- the manager had about the
13 employee. But it is not typical to have the complaining party
14 attend an investigation meeting about that complaining party's
15 complaint.

16 The second reason that Ms. Ivie gives for not
17 complying with the 80/20 rule was that she was trying to save
18 the company money, but that doesn't explain why she wasn't
19 coaching the people in Salt Lake City 80 percent of the time.
20 They lived in the same city as she did.

21 Ms. Ivie admits that no one ever told her, "Hey,
22 don't coach your people 80 percent of the time because of
23 budget concerns." The other district sales managers who
24 testified on Friday, they confirmed that they understood the
25 80/20 rule. There were no budget constraints on field

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1 coaching, and they continued to coach 80 percent of the time.
2 And even Larry Hinson, Ms. Ivie's witness on Friday morning, he
3 told you that there were no budget limits on coaching in the
4 field, and that's why he continued to do so.

5 So the evidence is clear that Ms. Ivie knew she had
6 to meet the 80/20 rule; that she failed to do so; and that's
7 the reason she was fired.

8 So is it a big deal that she wasn't meeting the 80/20
9 rule, coaching her team in the field? The evidence showed it
10 was a big deal. Ms. Ivie's district was not performing. The
11 members of her team were not performing. They needed her help.
12 They needed her in the field observing them as they interacted
13 with the doctors and coaching them on how to get better.

14 Even Ms. Ivie's two witnesses, Linda Truax and
15 Larry Hinson, they both agreed that in-person coaching is very
16 important; that the DSMS could not see things if they were
17 doing virtual coaching, and they needed to be in the field with
18 the rep so that they could see what the rep was doing and so
19 that they could coach the rep on how to better communicate with
20 the doctors.

21 In fact, Larry Hinson called virtual coaching a waste
22 of time and energy, and he did almost all of his coaching in
23 the field with his reps so he could give them feedback on what
24 he saw and help them improve their selling skills since that's
25 what DSMS are paid to do.

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1 The witnesses on Friday, who worked for Ms. Ivie --
2 Bob Stickle, Chris Thomsen, Craig Barnes -- they all confirmed
3 that they needed Ms. Ivie's help, and they didn't get it.
4 Remember, after Ms. Ivie was let go, Chris Thomsen interviewed
5 for the job and got it. And he testified that when he got the
6 job, he was out in the field coaching the team. And as a
7 result, the district improved significantly. Under Ms. Ivie,
8 the district was in the bottom 13 percent of the country at the
9 end of 2018. Mr. Thomsen said that at the end of 2019 every
10 territory in the Salt Lake City district finished in the top
11 30 percent in the nation. That's how he improved the
12 performance -- due to the in-person coaching that he did of the
13 team.

14 So I know Mr. Oswald has already gone through the
15 verdict form with you, but I'm going to do it one more time.

16 So this is the first question that you are going to
17 be asked to answer on the verdict form when you go back in the
18 jury room. I've highlighted what I consider to be the most
19 important language.

20 First, the law requires that Ms. Ivie prove her
21 claims. As the judge will explain to you, this means that
22 Ms. Ivie must convince you that her claim is more probably true
23 than not true. The evidence is very clear that Ms. Ivie was
24 fired for not meeting the expectations of the job and not for
25 the reasons that Ms. Ivie has come to court today to tell you.

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1 She has not proved her case.

2 Second, Ms. Ivie has to prove that she was fired
3 because she complained. This means she must prove that
4 AstraZeneca would not have terminated her employment but for
5 her complaint of off-label marketing. What does that mean?
6 How do you decide that? The question is: Would Ms. Ivie have
7 been fired even if she had not made the off-label complaint
8 that she did? And the evidence has shown that the answer to
9 that question is, yes, she would have been terminated, even if
10 she hadn't complained, because she wasn't doing her job. This
11 means that complaints were not the reason for her termination;
12 and therefore, Ms. Ivie has not met her burden of proof.

13 Remember, too, that Karen Belknap testified that
14 other DSMs had been fired for not meeting the coaching
15 requirement. This was not a problem that was unique to
16 Ms. Ivie. All Ms. Ivie had to do was do her job. All she had
17 to do is do what Ms. DiNunzio told her to do. It wasn't hard.
18 All the other DSMs were doing it. But even after receiving the
19 written warning in March, she continued in April and May 2014
20 not to do the job that everyone else was doing and that she was
21 paid a lot of money to do. She was paid \$223,000 a year to do
22 her job, and she wasn't doing it.

23 Now, Mr. Oswald argued that these August/
24 September 2018 emails were complaints that Ms. Ivie was making
25 about off-label marketing. I went through these emails with

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1 you. It is Exhibit 123. You will see when you look at that
2 email, there is no complaint about illegal or unethical
3 conduct. There is no statement by compliance that there was
4 any unethical conduct. There was no statement by compliance
5 that insights couldn't be sent out. All this email chain
6 showed is that Ms. DiNunzio was asking Ms. Ivie, as the
7 compliance person, is it okay for the sales reps to email local
8 insights between each other? Ms. Ivie, as she is supposed to
9 do, if she doesn't know the answer, goes to the compliance
10 department and says, "Hey, is it okay for the reps to email
11 insights between each other?" The compliance department writes
12 back and says, "Hey, we don't regulate these things. But if
13 you need some training, you can get training from the CL&D
14 department."

15 But Ms. DiNunzio says, "We don't need training; we
16 just got trained in March." So that's when she says, "Let's
17 put up a pause on this. Let's put a pause on this," meaning
18 let's not get more training. Ms. DiNunzio talked about all the
19 training they had in March and the 70-page slide deck and what
20 an insight was and how it had to be compliant. Now, Ms. Ivie
21 couldn't remember that training and couldn't remember the slide
22 deck. But Ms. DiNunzio remembered it, and she said, "We don't
23 need more training. Let's put a pause on more training."
24 There was no complaint about any off-label conduct in that
25 email chain.

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1 The issue in this case is not whether Ms. Ivie's
2 complaints were true or not. You heard that AstraZeneca
3 investigated her complaints and found them to be
4 unsubstantiated. But even if they had been substantiated,
5 under the law, if she would have been fired anyway for not
6 doing her job, she cannot prevail on her claims. So even if
7 the complaints were substantiated, she still has to be able to
8 do her job. And if she doesn't do her job, then she cannot
9 prevail on her claims.

10 Now, in his closing argument, Mr. Oswald mentioned
11 the fact that that Ms. Amy Welch, the HR business partner who
12 testified on Friday, who, by the way, said she was not even
13 involved in the termination decision, that she sent a document,
14 after Ms. Ivie was let go, to Barbara McCullough, listing the
15 reasons for the termination. You can see these are the reasons
16 that he quoted from this document. He focused only on the
17 second bullet, "Suzanne is not willing to engage" -- the first
18 bullet is, "Suzanne is not willing to engage in business as
19 usual work." That's one of the reasons. We know that to be
20 true from the testimony.

21 The second one is the one he focused on, "Suzanne is
22 not accepting the results of the investigations that have
23 occurred and continues to raise similar complaints." It goes
24 on, "Due to the continued performance challenges and concerns
25 with Suzanne delivering against the duties of the job, the

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1 business will be proceeding with terminating Suzanne Ivie from
2 the organization as of June 6th, 2019."

3 What Mr. Oswald did not show you was page 1 of that
4 same memo. Look at page 1. In it, Ms. Welch writes, "Suzanne
5 is not engaging with Stephani and continuing to push back on
6 Stephani. Additionally, she would regularly cancel meetings,
7 and the team was still not being coached, as expected as part
8 of the DMS role."

9 This is still in this memo. "Suzanne continued to
10 raise complaints that were the same as previously raised. HR
11 and compliance have engaged in conversations with Suzanne to
12 remind her that the complaints that had been previously
13 investigated and had been unsubstantiated."

14 So he didn't show you page 1. But if you look at the
15 entire memo, you will understand the context of the statement
16 in page 2.

17 On page 1, the memo explains that what Suzanne is
18 doing is refusing to accept complaints that have already been
19 made and investigated, not that she was fired and continuing to
20 make new complaints. That's why Ms. Ivie says on page 2 that
21 she is being fired for not accepting the results of complaints
22 that were previously made and investigated.

23 Mr. Oswald also mentioned the McCullough email, but
24 remember, Ms. McCullough was not involved in the termination;
25 didn't know anything about the reasons for it. She just wanted

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1 to be sure, as is important, that everything was being handled
2 appropriately. Ms. McCullough never suggested that the
3 termination was improper.

4 Mr. Oswald talked about the corporate integrity
5 agreement. Remember that agreement was for a different
6 product, a different group of people, a different group within
7 the company. It had nothing to do with SYMBICORT. It had
8 nothing to do with Ms. DiNunzio or her district or Ms. Ivie's
9 district.

10 All of the witnesses, including the plaintiff's own
11 witness, Linda Truax, agreed that the company took compliance
12 seriously. It instituted annual compliance training for the
13 entire company, as well as a new code of conduct.

14 As the witnesses testified, Ms. Ivie needed to move
15 on, build her relationship with DiNunzio, instead of refusing
16 to meet with her and repeating complaints that had already been
17 raised and investigated and resolved.

18 Let's look at Question No. 2 on the verdict form.
19 This is the claim for Oregon whistleblower retaliation. Again,
20 "Did the plaintiff prove by a preponderance of the evidence
21 that the defendant terminated plaintiff's employment because
22 she made a good faith report," and it goes on, "and the report
23 made a difference in different's decision to terminate
24 plaintiff?"

25 So the new element in this one is the good-faith

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1 report. That wasn't in the False Claims Act one. So you
2 should look at the jury instructions on this claim, and I'm not
3 going to go through all the evidence why she cannot prevail on
4 the complaint, except to note that the complaint had to be in
5 good faith in order to state a claim under Oregon law.

6 Given the timing of the complaint right after the bad
7 review, complaining of conduct that occurred -- of conduct
8 months earlier, you may well conclude that the complaints were
9 because Ms. Ivie was angry at Ms. DiNunzio for the bad review
10 and wanted to get back at her and therefore were not made in
11 good faith.

12 Slide No. 3. Age discrimination. Did plaintiff
13 prove by a preponderance of the evidence that the defendant
14 terminated the plaintiff because of her age; that is, that
15 defendant would not have terminated the plaintiff but for her
16 age?

17 It's the same standard as the federal False Claims
18 Act standard that we talked about in response to
19 Question No. 1. Unless Ms. Ivie has convinced you that she was
20 fired because of her age, that AstraZeneca would not have fired
21 her if she was younger, then you should find in favor of
22 AstraZeneca on this claim.

23 So why does Ms. Ivie think it was her age? Three
24 things: Benatar, old pharma, and wrinkles. I am not going to
25 go through all the evidence on that. I'm confident that you

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1 will determine that none of these three things showed that
2 AstraZeneca discriminated against Ms. Ivie because her age.

3 In addition, AstraZeneca presented evidence that
4 Ms. Ivie's age had nothing to do with the termination. She was
5 terminated for not meeting the requirements of the job.
6 Remember, Ms. Ivie is not is that much older than Ms. DiNunzio.
7 In fact, she is about the same age or not much older than the
8 other district sales managers. Remember Bob Stickle that came
9 into court on Friday? He is 66 years old. He still remains
10 employed by AstraZeneca. He testified that he has never
11 experienced age discrimination from AstraZeneca or from
12 Ms. DiNunzio. In fact, Ms. Ivie presented no witnesses who
13 supported her claim of age discrimination. She simply cannot
14 meet the burden of proof.

15 All right. The next question you get to answer is
16 whether she was retaliated against for complaining of age
17 discrimination, the same standard: Did the plaintiff prove by
18 a preponderance of the evidence that the defendant terminated
19 plaintiff because she complained to defendant that she had been
20 discriminated against based on her age; that is, that defendant
21 would not have terminated plaintiff but for the complaint?

22 The same standard as the False Claims Act, the one we
23 discussed earlier and the age discrimination that we discussed
24 earlier and the federal law. Plaintiff has to prove that she
25 was fired because she complained of age discrimination. This

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1 means that she must prove that AstraZeneca would not have
2 terminated her but for her age discrimination claim.

3 As with the other claims, Ms. Ivie has failed to
4 prove that she was fired because she complained of age
5 discrimination rather than because she failed to meet the
6 requirements of the job, after being repeated told, orally and
7 in writing, that she had to do so.

8 The next claim involves the Family Medical and Leave
9 Act and then the Oregon equivalent, the Oregon Family Leave
10 Act. Did plaintiff prove by a preponderance of the evidence
11 that plaintiff's medical leave was a negative factor in the
12 defendant's decision to terminate her employment?

13 So what evidence did Ms. Ivie present to you to
14 support her claim that AstraZeneca terminated her employment
15 because she took a leave? Ms. Ivie points to a number of
16 things that happened after she returned from leave. I'm not
17 going to go through all of them. They're in Exhibit 94.

18 Just let me pick out a couple of them. Ms. Ivie
19 claims -- by the way, Ms. Belknap summarizes the entire
20 investigation that she did into -- I think there were nine
21 complaints that Ms. Ivie made when she returned from leave that
22 she felt that Ms. DiNunzio was retaliating against her.
23 Ms. Belknap conducted a thorough investigation, and that
24 exhibit, Exhibit 94, goes through the entire investigation of
25 the findings and the evidence that supported the findings.

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1 Let's take a look at a couple of findings. Ms. Ivie
2 claimed that the number of coaching days increased from 150 to
3 160 while out on leave. Instead of asking Ms. DiNunzio, "Hey,
4 how did the number of days go from 150 to 160," she made a
5 complaint with HR about it. As Ms. Belknap explained, there
6 was an email to the entire U.S. sales team, which is part of
7 Exhibit 94, that increased the number of field coaching days
8 from 150 to 160 for everyone. That increase wasn't done to
9 retaliate against Ms. Ivie for taking the leave; instead it
10 shows the importance that the company placed on DSMs doing
11 in-person coaching of their reps since now it required even
12 more coaching.

13 Ms. Ivie argued that Ms. Ms. DiNunzio retaliated
14 against her for taking leave when she asked the other DSMs to
15 help her when she returned from leave. This is what we call in
16 employment law: No good deed goes unpunished.

17 Ms. DiNunzio was trying to help Ms. Ivie get back up
18 to speed on all the things that she'd missed while she was out
19 on leave. Now Ms. Ivie turns that around and says that
20 Ms. DiNunzio is retaliating against her by asking other people
21 to help her on the things she missed while out on leave. The
22 evidence shows this was not retaliation. In fact, it was quite
23 the opposite: Ms. DiNunzio was trying to help Ms. Ivie
24 succeed.

25 Look at what DiNunzio says at the very end of the

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1 email to the other DSMS, copying Ms. Ivie, asking them to help
2 her out. It is part of Exhibit 94. "Thank you for pitching in
3 to make sure that Suzanne has everything she needs to lead and
4 coach her team."

5 Now, another thing that Ms. Ivie claims is
6 retaliation for taking the leave is the fact that her
7 compliance ambassador role was taken away after she returned
8 from leave. But as the evidence in this case showed,
9 Ms. DiNunzio had asked Ms. Ivie to cut back on these
10 nonessential roles in December of 2018 in that review meeting.

11 Ms. DiNunzio told Ms. Ivie to focus on improving the
12 performance of the team rather than these nonessential things
13 that were taking up her time. This had nothing to do with
14 Ms. Ivie taking the leave, because it had occurred long before
15 she took her leave.

16 Ms. Ivie presented no other evidence that AstraZeneca
17 terminated her employment as a result of her leave. She
18 presented no evidence that any other employees were terminated
19 because they took a leave. On the other hand, AstraZeneca
20 presented substantial evidence that Ms. Ivie was terminated not
21 because she took a leave, but because she wouldn't do her job
22 even after being repeatedly told orally and in writing that she
23 needed to do so.

24 Now, one of Mr. Oswald's arguments is that Ms. Ivie
25 was told only to complain to Ms. DiNunzio, the person she filed

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1 the complaint against. Think of the testimony of
2 Karen Belknap. Ms. Ivie was complaining when she returned from
3 leave about business decisions that the company has made.
4 Ms. Belknap didn't know the answer to those questions, so she
5 told Ms. Ivie, "If you have these questions, why don't you ask
6 Stephani, why don't you go back to Stephani and ask her the
7 questions." It's not fair to say that Ms. Belknap just sent
8 her back to Ms. DiNunzio. When those complaints were made by
9 Ms. Ivie, Ms. Belknap fully investigated them. She met alone
10 with Ms. Ivie to understand the complaints and then wrote up
11 her report as to the results of the investigation

12 Likewise, Dawn Ceaser didn't refuse to help Ms. Ivie.
13 To the contrary, she too investigated the new complaints that
14 Ms. Ivie was making. She met with Ms. Ivie without
15 Ms. DiNunzio present to investigate the complaints. She also
16 tried to set up a meeting between Ms. DiNunzio and Ms. Ivie so
17 that they could get their relationship back on track. It is
18 not fair to say into these HR people were not trying to help
19 Ms. Ivie and improve her relationship with Ms. DiNunzio so that
20 she could continue to work at AstraZeneca going forward.

21 The next question you're going to be asked to answer
22 is a claim for state law employment discrimination. Here is
23 the question: Did plaintiff prove that the plaintiff's age was
24 a substantial factor in the defendant's decision to terminate
25 the plaintiff; that is, that defendant would not have

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1 terminated the plaintiff but for her age?

2 This is the claim under Oregon law, similar to but
3 not identical to the federal law claim. Look at the jury
4 instructions on that. I'm not going to repeat all the reasons
5 why the evidence does not show that Ms. Ivie cannot prove that
6 she was discriminated against based on her age.

7 All right. The next questions relates to damages.
8 As the judge will instruct you, and as the verdict form
9 explains, you don't need to answer any of these damage
10 questions unless you've already found that AstraZeneca had
11 retaliated or discriminated against Ms. Ivie. So you can skip
12 these questions entirely unless you find AstraZeneca is liable.

13 Now, you will recall that Ms. Ivie submitted two
14 experts in support of her damages claim. And as the judge will
15 explain to you in the jury instructions, you can accept or
16 reject the testimony of these experts; give it as much weight
17 as you think it deserves.

18 The first expert was Mr. Severt. He was that
19 vocational expert. The second was Dr. Edelman. Dr. Edelman
20 told you he's just the numbers guy. He relied entirely on what
21 Mr. Severt said. So if you don't find Mr. Severt credible or
22 reasonable, then you shouldn't rely on the numbers that
23 Dr. Edelman came up with.

24 Now, there are lots of reasons why you shouldn't rely
25 on Mr. Severt's numbers. First of all, he said that his

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1 numbers were based on a 100 percent probability that Ms. Ivie
2 would have been promoted and that her pay would have increased
3 by 50- to 60,000 a year, but he did no research to support
4 whether that assumption is true, and there is no evidence to
5 support Ms. Ivie's claim that she would have been promoted.

6 As Amy Welch testified on Friday, there were very few
7 possible openings in the training department when Ms. Ivie
8 thought she might have got a job. All of them were in
9 Delaware, not in Salt Lake City, and it would be a lateral
10 transfer, not a promotion, and, in fact, the training jobs paid
11 less than the 223,000 a year that Ms. Ivie was getting in her
12 district sales manager job.

13 So even if there had been an opening, and even if
14 Ms. Ivie applied for the position, there was no guarantee she
15 would get it.

16 Amy Welch also testified that Ms. Ivie was not on the
17 succession planning list, which is where the high performers
18 are considered for promotion. So if you find that Ms. Ivie
19 would not have been promoted and would not have got a 50 to
20 60 percent pay raise, then Mr. Severt's numbers go out the
21 door, and Dr. Edelman's numbers likewise go out the door,
22 because he relied on Mr. Severt's number.

23 Another reason that Mr. Severt's numbers -- you
24 shouldn't rely on his testimony -- is that he said that
25 Ms. Ivie couldn't get a job because she was a whistleblower.

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1 But he presented no evidence to support his claim that the
2 reason that she couldn't get a job was because she was a
3 whistleblower or that any of the jobs that she applied for even
4 knew she was a whistleblower.

5 Ms. Ivie admitted that she certainly didn't tell
6 anyone that she was a whistleblower. In fact, she told some of
7 the people that she hadn't even been fired.

8 So if a potential employer had Googled Ms. Ivie, and
9 there is no evidence that anybody did, and if they found the
10 lawsuit, perhaps they wouldn't have hired her because they had,
11 in fact, found out she had been fired, and she wasn't accurate
12 in her application.

13 Third, Mr. Severt assumed that Ms. Ivie would have
14 stayed at AstraZeneca through retirement. He did not consider
15 the fact that AstraZeneca went through after large reduction in
16 force in December of 2020 that resulted in one of the DSMs in
17 Ms. Ivie's region being laid off. He didn't consider whether
18 Ms. Ivie instead of this other DSM would have been laid off --
19 instead of the other DSM -- which would have cut off her
20 damages at that time.

21 So again, all of his calculations assume that she
22 would have stayed employed through retirement, and he didn't
23 discount for the fact that she might have been let go in
24 December of 2020 instead of the other DSM in that district.

25 Another reason to not rely on the numbers of

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1 Mr. Severt is that he compared Ms. Ivie with someone who has
2 four to five years of sales management experience, even though
3 Ms. Ivie had 30 years of experience, and even though he agreed
4 that sales management experience can go from one industry to
5 another.

6 Finally, he called Ms. Ivie a C-level executive to
7 explain why it took so long for her to find a new job. A
8 C-level executive is the chief executive officer, the chief
9 information officer, the chief financial officer -- the ones
10 with this "chief" in their name. That's what C-level executive
11 means. Ms. Ivie was not a C-level executive.

12 The next question you are going to be asked to answer
13 relates to economic damages/emotional distress. What damages
14 for emotional distress or suffering, if any, did plaintiff
15 prove by a preponderance of the evidence that Ms. Ivie
16 sustained as a result of the unlawful conduct?

17 As the judge will instruct you and as the verdict
18 form makes clear -- this verdict form is complicated. It says
19 if "yes to this, then go to that," or, "no, go here." You have
20 to draw a little map to show where you are going.

21 But as the judge will explain, and the verdict form
22 explains, you only answer this question on emotional distress
23 if you find in favor of Ms. Ivie on her False Claim Act claim
24 or her Oregon state law whistleblower and retaliation claim.
25 Emotional distress claims are not recoverable under the ADEA

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1 claim -- that's the federal age discrimination claim, the
2 Family and Medical Leave Act claim or Oregon's Family Medical
3 and Leave Act claim. Even if you find in favor of her on some
4 of those claims, you don't get to emotional distress; only on
5 the other claims.

6 So there is no doubt that being fired was upsetting
7 to Ms. Ivie. It is to anybody. But what evidence did Ms. Ivie
8 submit to support her claim that she suffered emotional
9 distress because she was fired? Well, first, she told you that
10 the emotional distress started in October and November of 2018
11 before she was fired, before she made the complaint in
12 December, before she got the written warning in March. But it
13 was also at that time that her team was at the bottom of the
14 country in meeting its performance requirements, and that would
15 be upsetting to anybody, and it was no doubt upsetting to
16 Ms. Ivie. But she doesn't get damages for that, because it was
17 unrelated to complaints and unrelated to her age.

18 Second, Ms. Ivie presented testimony of her doctor
19 who treated her on March 1st. Again, this was right at the
20 time she knew she was going to get the written warning. It is
21 not surprising she was upset when she was told she was going to
22 get a written warning. But that had nothing to do with her
23 complaints; nothing to do with her age.

24 Remember that the discussion with Ms. Ivie about
25 Ms. DiNunzio's concerns about Ms. Ivie not meeting the job

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1 requirements was on February 18th, and Ms. DiNunzio didn't even
2 know that Ms. Ivie had complained until after then.

3 Ms. Ivie submitted no testimony from any doctor
4 showing that she was treated after her termination.

5 Now, Ms. Ivie presented testimony from three of her
6 friends who flew out here from Utah to discuss her emotional
7 distress. That's what good friends do. First, Jenny Capell.
8 She said that Ms. Ivie used to go to basketball games and
9 practices three to four times a week, but towards the end of
10 2018 she cut back on the number of games and practices she was
11 attending.

12 Now, as a full-time employee with a job that required
13 travel, it's surprising that Ms. Ivie had enough free time to
14 go to three or four basketball practices or games a week.
15 Remember, Chris Thomsen told you that his son played basketball
16 too, but that didn't stop him from coaching in the field and
17 traveling to reps, even if it meant him missing his son's
18 basketball games.

19 Ms. Capell's testimony does not support Ms. Ivie's
20 claim that she suffered emotional distress because of her
21 complaints or because of her termination, because Ms. Capell
22 said that that emotional distress started in October or
23 November of 2018, before she made any complaints and at the
24 time that her district's performance was suffering and her
25 numbers were so low.

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1 Now, Ms. Ivie brought in two other friends from her
2 college days. They talked about the girls' weekend that they
3 had at Ms. Ivie's house in July of 2019 shortly after Ms. Ivie
4 was let go in June of 2019. They said that Ms. Ivie was not
5 her usual self at that girls' weekend. In fact, both of them
6 used the same word -- "surfacey" -- to describe Ms. Ivie.
7 Again, it is not surprising that Ms. Ivie was feeling down
8 after being laid off a month earlier. In fact, it is pretty
9 impressive that she was able to put on a girls' weekend at her
10 house just one month after she was let go.

11 Neither witness supported Ms. Ivie's claim that she
12 suffered any significant emotional distress after being let go.
13 None of these friends worked with Ms. Ivie. They didn't know
14 anything about her work. They didn't know whether she was
15 performing her duties in accordance with AstraZeneca's
16 expectations.

17 Then remember Exhibits 546 and 554. Those are the
18 chatty texts that Ms. Ivie has to friends in June and November
19 of 2019. She says she's doing great. She's having the time of
20 her life; spending time with family, friends, and traveling.
21 They do not suggest that Ms. Ivie was suffering significant
22 emotional stress because of the termination of her employment.

23 You also will be asked to look at mitigation of
24 damages. So mitigation of damages, as the judge explains in
25 the instructions, asks whether Ms. Ivie did enough to look for

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1 another job. Ms. Ivie claims it took a long time to find
2 another job, and the best job she can get is a part-time job at
3 BYU. It is not even a district manager's job. She says that
4 she has applied for a number of jobs, but we have no idea what
5 those jobs were or why she didn't get them.

6 Mr. Severt suggested it was because she had filed
7 this lawsuit, alleging that she was branded a whistleblower.
8 He presented no evidence to support that claim that any
9 potential employer had any knowledge that Ms. Ivie had filed
10 this lawsuit, and that that's why these people didn't get her
11 the job.

12 If such evidence existed, Ms. Ivie would have
13 presented it to you. And she didn't. In addition, even if
14 Mr. Severt was right, if Ms. Ivie had accepted the severance
15 package that she asked for and which the company offered her,
16 there would have been no lawsuit. But she didn't.

17 So if you decide to award Ms. Ivie damages, you
18 should decide how quickly Ms. Ivie could have gotten another
19 job if she had used reasonable efforts. Then you subtract that
20 number from the economic damages you may have awarded to her.
21 And you will recall that Dr. Bierhanzl said that an average
22 employee takes 13 weeks to find a new job and the median was
23 four to five weeks.

24 ADEA/willfulness. Mr. Oswald went through this with
25 you. You only answer this question if you find that

Closing Statement

1 AstraZeneca discriminated or retaliated against Ms. Ivie
2 because of her federal age discrimination claim and if you
3 awarded her damages. If you didn't find in favor of Ms. Ivie
4 on her age claims, and you didn't award her damages, then you
5 don't answer that question.

6 This is the judge's instruction to you on
7 willfulness: "The plaintiff has the burden of proving
8 willfulness by a preponderance of the evidence. The
9 defendant's conduct is willful if the defendant knew or showed
10 reckless disregard for whether the plaintiff's termination was
11 prohibited by the federal age discrimination law, the ADEA."

12 As this instruction makes clear, you can only find
13 willfulness if you conclude that AstraZeneca knew or showed a
14 reckless disregard for whether it was firing Ms. Ivie because
15 of her age, or her federal age discrimination claim, or
16 complaint of age discrimination. She hasn't proved her age
17 discrimination claim. But even if you disagree, you have heard
18 the witnesses in this case. I am confident you will conclude
19 that they did not act willfully. To the contrary, they tried
20 to help Ms. Ivie succeed in her job. It was only because she
21 refused to do what she was required by her job to do that she
22 was let go.

23 Now, there are some other important jury instructions
24 I want to go through with you. This one says, "It is your duty
25 to find the facts from all the evidence in the case. To those

Closing Statement

1 facts, you'll apply the law as I give it to you. You must
2 follow the law as I give it to you, whether you agree with it
3 or not, and you must not be influenced by any personal likes or
4 dislikes, opinions, prejudices, or sympathy. This means that
5 you must decide the case solely on the evidence before you.
6 You will recall that you took an oath to do so."

7 So two very important parts of this instruction: You
8 have got to follow the law as the judge gives it to you,
9 whether you agree with it or not, and you took an oath to do
10 so. It also tells you that you can't be influenced by personal
11 likes, dislikes, opinions, prejudices, or sympathy. This is
12 really important. We can all feel sympathy for Ms. Ivie that
13 she lost her job, but you can't let that sympathy influence
14 your decision. You have to decide the case on the evidence
15 that you heard, the instructions of the judge, and not because
16 you feel sympathetic to Ms. Ivie.

17 Another important jury instruction: "All parties are
18 equal before the law and a corporation is entitled to the same
19 fair and conscientious consideration by you as any party." So
20 this tells you that AstraZeneca is a corporation is entitled to
21 be treated fairly and conscientiously by you.

22 All right. I am going to talk a little bit about
23 credibility. One of the jobs of the jury is to decide
24 credibility. The jurors listen to the witnesses testify, and
25 then they decide which witnesses are more credible than others.

Closing Statement

1 So let's talk first about Ms. Ivie. Let's look at
2 some of the evidence that you heard in this case that should
3 impact your decision on the credibility of Ms. Ivie. When she
4 was being questioned by her own lawyer, she spent a large part
5 of her testimony telling you how distraught she was and how
6 upset she was about her belief that Ms. DiNunzio was telling
7 her to sell DALIRESP off-label.

8 She said that there was a team meeting with a team on
9 December 10th to 12th, 2018; that it was discussed. Then she
10 talked to Ms. DiNunzio about it. Then on the 19th, when they
11 had the review meeting, she again said she talked to
12 Ms. DiNunzio about the fact that Ms. DiNunzio was telling her
13 to sell DALIRESP off-label.

14 But look to the hotline complaint. That's
15 Exhibit 82. Just a week after that regional meeting and the
16 same day that she got that bad review, right after she gets the
17 bad review, she writes up the hotline complaint, and nowhere
18 does it mention this alleged off-label selling of DALIRESP.

19 Surely, if she had that conversation with
20 Ms. DiNunzio a week before, the day she files the complaint,
21 she would have mentioned that Ms. DiNunzio was trying to get
22 her to sell DALIRESP off-label. But it is not there. Does
23 that make her testimony in court credible? If she was so
24 concerned about it, surely she would have mentioned it in the
25 hotline complaint. But she didn't.

Closing Statement

1 What she did mention in the hotline complaint were
2 things that had happened months earlier, things that she never
3 complained about at the time, even though she was the
4 compliance representative, and even though she knew she was
5 obligated to report it if she thought there was anything
6 improper.

7 So ask yourself why did she wait until she finds out
8 she is going to get a bad review and then file a hotline
9 complaint immediately afterwards, complaining about things that
10 happened months before, not about the things that supposedly
11 happened the week before and the same day.

12 Another thing you should consider in assessing
13 Ms. Ivie's credibility is why no one else heard Ms. DiNunzio
14 say the things that Ms. Ivie says that Ms. DiNunzio said about
15 encouraging off-label promotion. As the evidence showed, these
16 statements were supposedly made at group meetings, which many
17 people attended, yet no one who attended these same meetings
18 heard any statements encouraging off-label promotion.

19 That's why the compliance investigation report found
20 the allegations unsubstantiated, because no one substantiated
21 what Ms. Ivie was saying what Ms. DiNunzio said. Consider this
22 when you're assessing Ms. Ivie's credibility: She came into
23 court and swore under oath that off-label statements were made.
24 How come no other witnesses heard what she heard? How come
25 no one else agrees with her that these statements were made?

Closing Statement

1 In assessing credibility, consider also Ms. Ivie's
2 claim that this "old pharma" referred to age. Ms. DiNunzio
3 came to Court to credibly deny that the statement had anything
4 to do with age. During the investigation conducted by
5 Ms. Belknap, all of the witnesses denied that the statement had
6 anything to do with age. Look at Exhibit 84. That's the
7 summary of what every witness who was interviewed and
8 supposedly heard this "old pharma" comment and whether it
9 related to age, every one of those witnesses in Exhibit 84 that
10 was interviewed as part of the investigation into this age
11 discrimination claim that was made in December about the
12 "old pharma" comment, all of them denied that it had anything
13 to do with age. And all of them instead said it referred to
14 mindset; how pharma needed to change.

15 Some of these same witnesses came into court and
16 agreed that all of the statements reflected mindset, not age.
17 Not one single witness besides Ms. Ivie thought it referred to
18 age. Consider that as you are assessing credibility.

19 Ms. Ivie also testified that she was unhappy about
20 the "Benatar" nickname and felt it referred to her age, and she
21 didn't like it. You saw the photo that prompted the nickname,
22 Exhibit 533. You saw the text messages between Ms. Ivie and
23 Ms. DiNunzio about the nickname, Exhibit 539. You saw
24 Ms. DiNunzio's explanation of the nickname, Exhibit 73. Was
25 Ms. Ivie credible when she testified about the "Benatar"

Closing Statement

1 nickname? None of the other witnesses, including Ms. Ivie's
2 own witness, Larry Hinson, felt that "Benatar" had anything to
3 do with age.

4 Does it make sense to you that Ms. Ivie waited 16
5 months after she got the "Benatar" nickname to complain of age
6 discrimination? Even though she had been given that nickname
7 in January of 2018, even though she complained of age
8 discrimination in December of 2018, she didn't raise the
9 "Benatar" nickname as evidence of discrimination until May of
10 2019. Does that make sense to you?

11 Was Ms. Ivie credible when she complained that
12 Ms. DiNunzio retaliated against her for taking a leave of
13 absence? Ms. Belknap, in her investigation concluded that
14 there were legitimate reasons for all the things that happened
15 to Ms. Ivie after she returned from leave, and none of them
16 were retaliatory.

17 Consider also, as you assess Ms. Ivie's credibility,
18 that she admits to lying to prospective employers about not
19 being fired. Consider, as you assess Ms. Ivie's credibility,
20 the testimony that she completed field coaching reports, even
21 though she wasn't in the field coaching.

22 Remember, as you assess her credibility, the
23 testimony that she used her own PRID number to acknowledge
24 receipt by a sales rep of a field coaching report, a report in
25 which she says she was in the field, when she, in fact, had not

Closing Statement

1 been in the field. The sales rep is supposed to put their own
2 number in there acknowledging that they received their report.
3 Ms. Ivie put her number in there, acknowledging that the sales
4 rep had received the report. She knew she wasn't doing her
5 job, she wasn't helping her people, and she tried to hide it.

6 Now, let's look at the credibility of Ms. DiNunzio.
7 All the witnesses, including Mr. Hinson and Ms. Hamilton,
8 testified that she is a tough boss. She holds employees
9 accountable to meet AstraZeneca's standards and performance.
10 She did this for all the employees. By doing so, she made
11 things better. Ms. Ivie did not bring into court a single
12 witness who testified that Ms. DiNunzio treated them better
13 than they treated Ms. Ivie.

14 Remember Ms. DiNunzio's passionate testimony about
15 COPD patients benefit from AstraZeneca's drugs and how
16 important it is to sales reps to sell effectively so that
17 AstraZeneca's FDA-approved drugs can get to patients who might
18 otherwise die without them? Ms. DiNunzio's focus was on the
19 patients, and she didn't think that the reps in Ms. Ivie's
20 district were getting the help they needed from Ms. Ivie so
21 that they could do their jobs and help patients, as many
22 patients as possible.

23 Look at our HR witnesses. As you think about
24 credibility, think of these three HR witnesses who testified in
25 this case: Did Dawn Ceaser appear to be lying when she

Closing Statement

1 explained why Ms. Ivie was let go; when she said why she
2 recommended the termination; when she told you there was no
3 pathway forward for Ms. Ivie?

4 Did Karen Belknap and Amy Welch seem to be lying?
5 Did they seem biased against Ms. Ivie? Remember how Karen
6 Belknap told you that she delayed written warning in time to
7 give Ms. Ivie the time to decide whether she wanted the
8 severance package. If she had signed the severance package,
9 she would get the full bonus. But if she got the written
10 warning, she doesn't get the full bonus. So she was trying to
11 help her out. Even if Mr. Hinson said -- Larry Hinson,
12 Ms. Ivie's witness, said Ms. Belknap tried to help him out
13 after he decided to quit.

14 Larry Hinson, one of the last witnesses on Friday,
15 Ms. Ivie's witness, confirmed that Ms. DiNunzio was tough on
16 him too, because he was not meeting performance expectations.
17 And so he decided to quit and take another job. He hadn't
18 filed a hotline complaint. He wasn't alleging that
19 Ms. DiNunzio was off-label marketing. He never took FMLA
20 leave. How can Ms. Ivie credibly argue that Ms. DiNunzio
21 retaliated against her when she was having these same issues of
22 not meeting the job expectations, because she filed the hotline
23 complaint and because she took her leave, when Ms. DiNunzio did
24 exactly the same things to Larry Hinson, and he didn't file a
25 hotline complaint or take a leave of absence. Ms. DiNunzio

Closing Statement

1 treated them both the same. If they are not meeting the
2 performance expectations, she is going to meet with them and
3 tell them what they need to do to improve.

4 Continuing on with assessing credibility of
5 witnesses, Larry Hinson was gone by June of 2018. He knows
6 nothing about what happened after that. He came across as
7 someone who was very angry at Ms. DiNunzio, because she was a
8 tough boss, who held him accountable, who criticized his
9 performance. Even though he admits that he did not meet
10 expectations, he received a two on his review and was at the
11 bottom of the pack actually.

12 Let's look at the witnesses who came in Friday --
13 Mr. Thomsen, Ms. Hamilton, Mr. Barnes, and Mr. Stickle. These
14 were the people who worked for Ms. Ivie and who were peers.
15 Did they look like they were lying when they talked about the
16 importance of in-person coaching? Did they look like they were
17 lying when they denied hearing comments about Ms. DiNunzio
18 encouraging off-label promotion, as Ms. Ivie claimed she heard?

19 Did Genie Hamilton seem like she was lying when she
20 talked how Ms. DiNunzio was a tough boss, focused on
21 performance, and meeting the company's expectations?
22 Genie Hamilton testified she understood the 80/20 rule. She
23 did what she was required to do, and her team was better off as
24 a result.

25 Consider Craig Barnes. He is the Mountain Dew

Closing Statement

1 addict. Did he seem like he was lying when he talked about how
2 little time Ms. Ivie spent with him in the field when she was
3 his manager, even though they lived 20 miles from each other?

4 How about Bob Stickle? He is the 66-year-old who
5 also lives close to Ms. Ivie. Did he seem like he was lying
6 when he talked about how little Ms. Ivie coached him in the
7 field and how Chris Thomsen, who replaced Ms. Ivie, spends a
8 lot of time in the field with him and helped him understand the
9 data and analyze the issues in his territory? Bob Stickle
10 testified that he needed help to improve his coaching since he
11 was not meeting expectations. His doctors' patients needed
12 help, but Ms. Ivie let them all down.

13 Consider the testimony of the last witness,
14 Chris Thomsen. Does he seem like he was lying? He says he
15 spends three to four days a week in the field with his reps.
16 He came in and told you that he never heard Ms. DiNunzio
17 encourage off-label promotion, and he confirmed both in court
18 and in the compliance investigation that he had never heard any
19 such comments.

20 He says that Ms. DiNunzio was always very clear that
21 they needed to stay on label and do the right thing. He
22 testified about what he observed when he covered Ms. Ivie's
23 territory when she was on leave. He told you that the
24 Salt Lake City team was not using the updated sales model and
25 hadn't been coached.

Closing Statement

1 Then, when Ms. Ivie was let go, he applied for the
2 position. He went through an interview. He decided to accept
3 the position in Salt Lake City, because it was the town where
4 he lived, and he wanted to spend more time with the family.
5 When he left the job in March of 2020, he had increased that
6 district to one of the top districts in the country. No
7 witness who has ever worked for Ms. Ivie came forward and
8 testified in this case that she was a great manager who was
9 doing her job.

10 All Ms. Ivie had to do to succeed at AstraZeneca was
11 to do the job that the company asked her to do and was paying
12 her a lot of money to do. She knew the requirements, but she
13 didn't follow them, even after receiving a written warning. No
14 company likes to let a long-term employee go. They do it with
15 reluctance. But there comes a time when a company can no
16 longer keep employed an employee who refuses to do her job
17 after being repeatedly told what she has to do.

18 I have said enough. I don't get to speak to you
19 again. I leave this case in your good hands.

20 On behalf of AstraZeneca, I thank you for your time.

21 (Court reporter asked for a ten-minute break.)

22 (Recess.)

23 (Open court; proceedings resumed:)

24 THE COURT: Sir.

25 MR. OSWALD: Thank you.

Rebuttal Argument

1 AstraZeneca, in its presentation to you, said that
2 Suzanne's complaints were meritless. What I want you to do is
3 I want you to look at each of Suzanne's complaints. Make your
4 own determination. Look at her complaint on the 19th of
5 December. Look at her complaint on February 5th. Look at her
6 complaint on May 16th. And you decide.

7 They say that Suzanne lost her job. She didn't lose
8 her job. AstraZeneca fired her. They fired her after 19
9 years, after never having any kind of discipline, after never
10 having complained at all in that 19 years.

11 And AstraZeneca talks about the 80/20 split. They
12 say it was a big deal not to do the 80/20 split. What did Amy
13 Welch say from the stand during her deposition? She said it
14 was "guidance." Larry Hinson said he was only evaluated on the
15 total number of coaching days, and that's what was in his
16 review. You will not see any mention of "80/20" in Suzanne's
17 reviews. Linda Truax said she had never heard of it before.
18 DSMs stopped in-person coaching at year-end, because of the
19 budget, just like Suzanne had said.

20 And I think maybe the most important, in 2018, look
21 at what Stephani DiNunzio says herself in Suzanne's 2018
22 performance review. She says nothing about the 80/20 split.
23 Of course, Dawn Ceaser says nothing about it in the employee
24 relations case for termination on the 6th of June. McCullough
25 tells us that it wasn't a policy until April of 2019.

Rebuttal Argument

1 Now, AstraZeneca says that Suzanne can be fired for
2 not following the 80/20 guidance; that Suzanne was not doing
3 her job; that the 80/20 rule was very important to AstraZeneca;
4 that she was out of whack with her peers; that the 80/20 rule
5 applied to all of the DSMs.

6 Let's take a look at two exhibits you haven't seen
7 yet, Plaintiff's Exhibit No. 54 and Plaintiff's Exhibit No. 62.
8 I'm not sure that you'll have access to Excel in the jury room,
9 so I reviewed this information with one question in mind, and
10 that is this: What percentage of days did Suzanne and all the
11 other DSMs spend in person?

12 Now, the data is all national DSMs. So I narrowed it
13 down to Suzanne's peers in the region for respiratory by
14 quarter, and I divided by the number of days coaching with
15 customer engagement by the total number of coaching days to
16 come up with a percentage to check the reality of the 80/20,
17 and here is what we found. Now, I have summarized this in a
18 chart for you. It goes by quarter. The first quarter of -- it
19 goes from the first quarter of 2018 through the first quarter
20 of 2019.

21 I left all the DSMs in the region. Red is below
22 80 percent. Green is above 80 percent. Let's look at my first
23 observation. First quarter Q1 of 2018, nobody is over
24 80 percent. None of DiNunzio's direct reports.

25 In quarter 2 of 2018, three people are over

Rebuttal Argument

1 80 percent.

2 In quarter 3 of 2018, only two people are over
3 80 percent.

4 Now in quarter 4, we don't have the data, or it
5 wasn't given to us. But look at the first quarter of 2019 --
6 three -- half of the total are over 80 percent, including
7 Suzanne.

8 My second observation. The average for everyone is
9 less than 80 percent. If this were really a rule, and if
10 DiNunzio were applying it consistently, why is the entire
11 region under 80 percent for the whole year?

12 Third observation: Chris Thomsen, the person who
13 replaced Suzanne, has lower numbers across the board. What
14 happened here was that DiNunzio needed an excuse. She needed
15 to say that she held everybody to the same standard of 80/20.
16 AstraZeneca points to this and says, "This is the reason that
17 we fired Suzanne." But look at quarter No. 1 of 2019, when she
18 gets the performance warning. Suzanne is over 80 percent;
19 3 percent from the highest percentage.

20 It is not hard to conclude what happened here.
21 Suzanne had 19 years of experience; 19 years of good
22 performance. She was someone at the highest level of ethics.
23 She wanted to win but only the right way.

24 AstraZeneca says, "You have to do what your boss
25 tells you no matter what." Really? You have to do what your

Rebuttal Argument

1 boss tells you to do unless that activity is illegal. And what
2 AstraZeneca is counting on is that you will let them get away
3 with it.

4 We would not be here today if Karen Belknap and
5 Dawn Ceaser had simply done their jobs, but they were more
6 interested in protecting DiNunzio, in flattering DiNunzio, in
7 putting a bow on Suzanne's termination than doing what they
8 should have done: Protecting employees from retaliation when
9 they report the company's drugs for unapproved uses.

10 And if Mike Pomponi had not turned a blind eye when
11 Suzanne came to him on May 16th, 2019, we might not be here.
12 But he simply forwarded her complaint to HR, who shared it with
13 Stephani DiNunzio. And everything else was a foregone
14 conclusion.

15 Finally, Barbara McCullough. We would not be here if
16 Barb McCullough had not been seen as a retaliation switch. She
17 didn't wake up until four days after AstraZeneca had already
18 fired Suzanne only to ask has she accepted the release of
19 claims.

20 AstraZeneca simply had a bad system. It is bad for
21 employees. It is bad for patients. It is bad for all of us.
22 And with your verdict, you can help fix AstraZeneca's own
23 system so that it is accountable again -- accountable to its
24 shareholders, accountable to its employees, accountable to its
25 patients, accountable to all of us.

Rebuttal Argument

1 I want to conclude with a story. It is a story of a
2 wise man and a smart-aleck young boy whose only goal was to
3 show up the wise man, and the young boy had a plan. He would
4 go into the forest, and he would find a baby bird. He would
5 cup it in his hands and bring it back to the old man, and he
6 would say, "Old man, is the bird alive, or is he dead?" And if
7 the old man said the bird is dead, he would open his hands, and
8 the bird would fly back to the forest. But if the old man
9 said, "The bird is alive," the boy would squish the bird and
10 kill it until it was dead.

11 So he went into the forest, he found a nest, and he
12 brought back the baby bird, in his hands, cuffed. "Old man,
13 what do I have within my hands?

14 "Why, young man, you have a baby bird.

15 "But, old man, is he alive or is he dead?"

16 And the old man smiled and said, "He is in your
17 hands."

18 Now Suzanne's case is in yours.

19 THE COURT: Thank you.

20 Members of the jury, we are going to take our noon
21 recess now. You are free to go have lunch. Please be prepared
22 to be back in the box at 1:00 p.m. At that time I will deliver
23 jury instructions and then the case truly will be yours. You
24 will begin your deliberations.

25 While you are at lunch, please remember: Do not

1 discuss the case with each other or with anybody else. This is
2 very, very important.

3 Thank you very much.

4 Thank you. See you at one o'clock.

5 Thank you, Counsel.

6 MS. RIECHERT: I would like to put a couple of things
7 on the record.

8 THE COURT: Certainly.

9 (Open court; jury not present:)

10 MS. RIECHERT: Do you want to do it now or at
11 one o'clock?

12 THE COURT: Let's do it now, if that's okay.

13 MS. RIECHERT: Sure. So I wanted to object to the
14 fact that in Mr. Oswald's closing argument he referred to the
15 termination being only one factor. That's exactly what we had
16 talked about in the jury instructions and the verdict form.
17 That's inconsistent with the law and inconsistent with the
18 instructions, and yet he kept saying with that list of things
19 that you went to the grocery store list with -- one was sugar
20 or something -- that it only had to be one factor. So I wanted
21 to put on the record my objection to that.

22 THE COURT: Thank you.

23 MS. RIECHERT: Secondly, I have no idea where this
24 chart came from. I have never seen it before. It is something
25 apparently that Mr. Oswald created. To put that in front of

1 the jury, when it has never been mentioned in this entire case,
2 I object to that being done. It wasn't shown to us. I don't
3 know how he created it. And now I have no opportunity to
4 respond to it. It wasn't shown to any witnesses. So I wanted
5 to object on that basis.

6 THE COURT: Thank you.

7 Anything further? Objections for the record?

8 MR. OSWALD: I don't have any objections for the
9 record, Your Honor.

10 THE COURT: Okay. One o'clock.

11 Thank you.

12 (Recess.)

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1 (Afternoon session; open court; jury not present:

2 THE COURT: Would the defendant like to make a
3 motion, please?

4 MS. RIECHERT: I would move to strike the chart that
5 Mr. Oswald showed the jury in his rebuttal and get an
6 instruction from the Court that the jury is not to consider it.
7 This chart was created by Mr. Oswald. He never showed it to
8 us. There has been no testimony about it; and therefore, there
9 is no way that should have been shown to the jury when it was.
10 And it was.

11 THE COURT: Thank you.

12 Mr. Oswald.

13 MR. OSWALD: Your Honor, it is an accurate depiction
14 of what is in evidence, the two exhibits themselves at
15 reference. They are spreadsheets in fact, and I simply took
16 the data that is there, and as I indicated, I took just the
17 areas of the country that reported to Stephani DiNunzio. So
18 the evidence is in the spreadsheet. We simply reduced it to
19 the relevant portions of what is in evidence. So it's an
20 accurate depiction of the evidence in the case.

21 MS. RIECHERT: Your Honor, the evidence is the
22 evidence. I believe that Mr. Oswald said he did some math as
23 well. In any event, what's in evidence is in evidence. That
24 chart is not in evidence. It was not shared with us or
25 created. The jury should be instructed not to consider it.

1 THE COURT: The chart is not going to the jury,
2 right?

3 MR. OSWALD: No, Your Honor.

4 MS. RIECHERT: But it was shown to the jury in
5 rebuttal without us having any opportunity to respond to it.
6 This case has been going on for five days. There has been
7 plenty of witnesses. Now, in closing, in his rebuttal, in
8 closing he raises some issue that has never been raised before
9 in this case.

10 THE COURT: Would you like for the Court to show the
11 jury again the exhibit, and then tell the jury to disregard it?
12 They are not going to remember what chart it is. You both have
13 shown so many charts.

14 MS. RIECHERT: It's the chart that was shown in
15 rebuttal, Your Honor. That's the one I would like the jury to
16 be instructed that they may not consider.

17 THE COURT: Do you want the Court to show them that
18 chart again to remind them which chart you are talking about?

19 MS. RIECHERT: I think he only had one chart.

20 MR. OSWALD: Your Honor, it is a fair depiction of
21 what's in the spreadsheet. It's all right there. I simply
22 took the individuals that are in Ms. DiNunzio's group, and
23 that's it. So it is an accurate depiction of what is there.
24 It is an appropriate demonstrative exhibit. I haven't offered
25 the exhibit in evidence. The underlying information is in

1 evidence. It is before the jury. It's their own exhibit,
2 Your Honor. They produced it to us. It's an accurate
3 depiction of what the evidence shows.

4 MS. RIECHERT: I don't know if that's true or not,
5 since I have never seen it before. I had no opportunity to
6 look at it or check Mr. Oswald's math. The exhibit can come in
7 as -- Exhibit 54 is in evidence. It is the chart that
8 Mr. Oswald created that he showed in rebuttal that summarized
9 what he thinks the exhibit shows. That's what I have objected
10 to. So I would like an instruction to the jury that the chart
11 that Mr. Oswald showed them in rebuttal, it is not in evidence
12 in the case and should not be considered.

13 THE COURT: Okay. And you had not seen the chart?

14 MS. RIECHERT: I have never seen that before.

15 MR. OSWALD: Your Honor, this is their exhibit. They
16 produced it. It's an exhibit in evidence. It is their
17 spreadsheet. It is what they produced. They produced it to
18 us.

19 THE COURT: What math did you do?

20 MR. OSWALD: I simply took the Excel spreadsheet, and
21 I took a snapshot of precisely DiNunzio's region for the
22 quarters that I had. So I had quarter 1 of 2018; quarter 2 of
23 2018; quarter 3 of 2018. We didn't have the fourth quarter,
24 and I indicated that. We did have the first quarter of 2019,
25 and that's what I showed the jury.

1 MS. RIECHERT: And you did some math to show the
2 percentage.

3 MR. OSWALD: Your Honor, all we did was take the
4 numbers that are there in the spreadsheet. That's precisely
5 what we did. Those are numbers in the spreadsheet. At the
6 bottom, yes, I divided one by the number. But the numbers are
7 the numbers. They are in the spreadsheet itself. It is an
8 accurate depiction of what is precisely in the spreadsheet.

9 MS. RIECHERT: I don't know that, because I have
10 never seen it before. The exhibit can go in. The jury can do
11 whatever they want to do with it. But the demonstration should
12 be struck, and the jury should be instructed that they cannot
13 consider that, because it wasn't shared with us. I have no
14 idea if it is accurate or not. I have no objection to the
15 exhibit going in.

16 THE COURT: The exhibit is in.

17 MS. RIECHERT: The exhibit is in. But whatever
18 Mr. Oswald did with the exhibit, that's what I have a problem
19 with. He keeps saying, "It is accurate." I don't know. I
20 haven't seen it, and I haven't had an opportunity to check it
21 out.

22 MR. OSWALD: They produced it in discovery. They
23 produced it. Of course, they had it. This is their chart. It
24 is their numbers.

25 MS. RIECHERT: I have never seen that chart before.

1 I have seen the underlying evidence, but I have never seen that
2 chart. I understand, under the court rules, we are supposed to
3 be shown the demonstratives before being shown to the jury.
4 That wasn't done here. And because of that, I would like the
5 Court to instruct the jury that they are not to consider it,
6 although they may consider the underlying exhibit.

7 THE COURT: I am going to deliver that instruction.

8 MS. RIECHERT: Thank you.

9 THE COURT: Gary, would you get the jury.

10 MR. OSWALD: Your Honor, what is the instruction the
11 Court is going to give?

12 THE COURT: While he is getting the jury, let's draft
13 an instruction.

14 MR. OSWALD: Before you do that, I would like to
15 understand what it is.

16 THE COURT: "You may not consider the chart that
17 Mr. Oswald used in his rebuttal argument. You may, however,
18 consider the underlying exhibit, Plaintiff's Exhibit 55."

19 You may not consider the chart Mr. Oswald used in his
20 rebuttal argument. You may, however, consider the underlying
21 exhibit, Plaintiff's Exhibit 55.

22 MR. OSWALD: Your Honor, I object. Let me tell you
23 why. I think that goes too far. It is argument. As with any
24 argument -- the proper instruction would be that you may only
25 use the chart. It is argument. It is not evidence. The

Jury Instructions

1 evidence is the underlying exhibit. And that is what should
2 control. I have no problem with that. That's perfectly
3 appropriate. But to say that they can't consider the argument,
4 Your Honor, I think, is inappropriate. It is an appropriate
5 argument based upon the information in the chart.

6 MS. RIECHERT: I disagree with that, Your Honor, for
7 the same reason. We have not seen this chart. We haven't had
8 an opportunity to review or comment on it. It may or may not
9 be accurate. I don't know. They should not consider the
10 chart. Your instruction is correct. They may consider the
11 underlying evidence.

12 THE COURT: I agree.

13 Will you please get the jury, Gary.

14 (Open court; jury present:)

15 THE COURT: Good afternoon. Please be seated.

16 As I indicated before we broke for our noon recess, I
17 will now deliver the instructions.

18 MS. RIECHERT: I don't know if your mic is on,
19 Your Honor. It is hard to hear.

20 THE COURT: Thank you for letting me know.

21 Members of the jury, now that you have heard all of
22 the evidence, it is my duty to instruct you on the law that
23 applies to this case. I don't think you have yet, but you will
24 receive a copy of these instructions that you may take to the
25 jury room with you during deliberations.

Jury Instructions

1 It is your duty to find the facts from all of the
2 evidence in the case. To those facts, you will apply the law
3 as I give it to you. You must follow the law as I give it to
4 you whether you agree with it or not, and you may not be
5 influenced by any personal likes or dislikes, opinions,
6 prejudices, or sympathy. That means that you must decide the
7 case solely on the evidence before you. And you will recall
8 that you took an oath to do so.

9 Please do not read into these instructions or
10 anything that I may say or do or have said or done that I have
11 an opinion regarding the evidence or what your verdict should
12 be.

13 When a party has the burden of proving any claim or
14 affirmative defense by a preponderance of the evidence, it
15 means that you must be persuaded by the evidence that the claim
16 or affirmative defense is more probably true than not. You
17 should base your decision on all of the evidence regardless of
18 which party presented it.

19 What is evidence? The evidence you are to consider
20 in deciding what the facts are consist of:

21 No. 1. The sworn testimony of any witness.

22 No. 2. The exhibits that are admitted into evidence.

23 No. 3. Any facts to which the lawyers have agreed.

24 And No. 4. Any facts that I have instructed you to
25 accept as proved.

Jury Instructions

1 What is not evidence?

2 In reaching your verdict, you may consider only the
3 testimony and exhibits received into evidence. Certain things
4 are not evidence, and you may not consider them in deciding
5 what the facts are. I will list them for you.

6 First, arguments and statements by lawyers are not
7 evidence. The lawyers are not witnesses. What they have said
8 during their opening statements, closing arguments, and at
9 other times is intended to help you interpret the evidence but
10 is not evidence. If the facts as you remember them differ from
11 the way the lawyers have stated them, your memory of them
12 controls.

13 No. 2. Questions and objections by lawyers are not
14 evidence. Attorneys have a duty to their clients to object
15 when they believe a question is improper under the rules of
16 evidence. You should not be influenced by the objection or by
17 the Court's ruling on it.

18 No. 3. Any testimony that is excluded or stricken or
19 that you have been instructed to disregard is not evidence and
20 must not be considered.

21 In addition, some evidence was received only for a
22 limited purpose. When I have instructed you to consider
23 certain evidence only for a limited purpose, you must do so,
24 and you may not consider that evidence for any other purpose.

25 Finally, anything you may have said or heard when

Jury Instructions

1 court was not in session is not evidence. You are to decide
2 the case solely on the evidence received at trial.

3 Direct and circumstantial evidence. Evidence may be
4 either direct or circumstantial. Direct evidence is direct
5 proof of a fact, such as the testimony by a witness about what
6 that witness personally saw or heard or did. Circumstantial
7 evidence is proof of one or more facts from which you could
8 then find another fact. You should consider both kinds of
9 evidence. The law makes no distinction between the weight
10 given to either direct or circumstantial evidence. It is for
11 you to decide how much weight to give to any evidence.

12 Stipulations of facts. The parties have agreed to
13 certain facts that I will read to you. You must therefore
14 treat these facts as having been proved. The parties stipulate
15 to the following:

16 No. 1. Beginning in 2012, Suzanne Ivie began
17 suffering from migraines.

18 No. 2. Starting from at least February of 2019,
19 Ms. Ivie's migraines increased in intensity, and she sought
20 care from a migraine specialist, Dr. Ashleigh Byrne.

21 Expert opinion. You have heard testimony from
22 experts who testified to opinions and the reasons for their
23 opinions. This testimony is allowed because of the education
24 or experience of these witnesses. Such opinion testimony
25 should be judged just like any other testimony. You may accept

Jury Instructions

1 it, or reject it, and give it as much weight as you think it
2 deserves, considering the witness's education and experience,
3 the reasons given for the opinion, and all the other evidence
4 in the case.

5 Charts and summaries received and not received in
6 evidence. Certain charts and summaries not admitted into
7 evidence have been shown to you in order to help explain the
8 contents of books, records, documents, and other evidence in
9 the case. Charts and summaries are only as good as the
10 underlying evidence that supports them. You should therefore
11 give them only such weight as you think the underlying evidence
12 deserves.

13 Certain other charts and summaries have been admitted
14 into evidence to illustrate information brought out in the
15 trial. Again, charts and summaries are only as good as the
16 testimony or other admitted evidence that supports them.

17 You may not consider the chart Mr. Oswald used in his
18 rebuttal argument. You may, however, consider the underlying
19 exhibit, Plaintiff's Exhibit 55.

20 There is an instruction in your packet titled
21 "Evidence in Electronic Format." It is on page 10. Please
22 ignore that. We thought we were going to give you the evidence
23 electronically, and we were unable to do so. So you will get
24 hard copies of the exhibits instead, and so I'm not going to
25 read this instruction. It no longer applies.

Jury Instructions

1 Corporations and partnerships; fair treatment. All
2 parties are equal before the law. A corporation is entitled to
3 the same fair and conscientious consideration by you as any
4 other party.

5 Liability of corporations; scope of authority, not an
6 issue. Under the law, a corporation is considered to be a
7 person and can act only through its employees, agents,
8 directors, or officers. Therefore, a corporation is
9 responsible for the acts of its employees, agents, directors,
10 and officers performed within the scope of authority.

11 False Claims Act retaliation; elements and burden of
12 proof. The plaintiff seeks damages against the defendant under
13 a federal law called the False Claims Act, or the FCA. The FCA
14 protects employees who oppose conduct by their employer that
15 violates the FCA. To prevail on this claim, the plaintiff must
16 prove each of the following elements by a preponderance of the
17 evidence:

18 No. 1. The plaintiff participated in an activity
19 protected by the False Claims Act. That is, she complained
20 about her manager's alleged encouragement of off-label drug
21 marketing.

22 No. 2. The defendant subjected the plaintiff to an
23 adverse employment action; that is, termination of the
24 plaintiff's employment.

25 And No. 3. The plaintiff was subjected to the

Jury Instructions

1 adverse employment action because she engaged in an activity
2 protected by the False Claims Act.

3 A plaintiff is "subjected to an adverse employment
4 action" because she engaged in an activity protected by the
5 False Claims Act if the adverse employment action would not
6 have occurred but for her engagement in that activity. Here,
7 both parties agree that the plaintiff engaged in an activity
8 protected by the FCA and that her termination on June 6th,
9 2019, constituted an adverse employment action.

10 The parties dispute the third element, that the
11 plaintiff was terminated because she complained about alleged
12 off-label marketing. If you find that the plaintiff has proved
13 all three of these elements, your verdict should be for the
14 plaintiff on this claim. If, on the other hand, the plaintiff
15 has failed to prove any of these elements, your verdict should
16 be for the defendant on this claim.

17 Oregon's Whistleblower Protection Act; elements and
18 burden of proof. The plaintiff claims that the defendant
19 retaliated against her in violation of an Oregon law that
20 protects employees who report information that they believe to
21 be evidence of the employer's violation of a state or federal
22 law, rule, or regulation.

23 To prevail on this claim, plaintiff must prove each
24 of the following elements by a preponderance of the evidence:

25 First, the plaintiff reported information that she

Jury Instructions

1 believed to be evidence of a violation of a state or federal
2 law, rule, or regulation.

3 Second, the plaintiff acted in good faith in
4 reporting the information.

5 Third, the plaintiff suffered an adverse employment
6 action.

7 And fourth, there was a causal link between the
8 plaintiff's report of information that she believed to be
9 evidence of a violation of a state or federal law, rule, or
10 regulation and the adverse employment action.

11 There is a causal link between the plaintiff's report
12 of information that the plaintiff believes to be evidence of a
13 violation of law and an adverse employment decision if the
14 plaintiff's report was a factor that made a difference in the
15 employment decision.

16 Here, the defendant does not dispute that plaintiff's
17 termination on June 6th, 2019, constituted an adverse
18 employment action. The defendant disputes the first, second,
19 and fourth elements. If you find that plaintiff has proved all
20 four of these elements, your verdict should be for the
21 plaintiff on this claim. If, on the other hand, the plaintiff
22 has failed to prove any of these elements, your verdict should
23 be for the defendants on these claims.

24 ADEA discrimination claim; elements and burden of
25 proof. The plaintiff has brought a claim of employment

Jury Instructions

1 discrimination against the defendant under a federal law known
2 as the Age Discrimination in Employment Act, the ADEA. The
3 plaintiff asserts that the defendant terminated the plaintiff
4 because of her age. The defendant denies that the plaintiff
5 was terminated because of her age and further asserts the
6 decision to terminate the plaintiff was based on a lawful
7 reason. To prevail on this claim, the plaintiff has the burden
8 of proving each of the elements by a preponderance of the
9 evidence.

10 First, the defendant terminated the plaintiff.

11 Second, the plaintiff was 40 years of age or older at
12 the time she was terminated.

13 Third, the defendant terminated the plaintiff because
14 of her age. That is, the defendant would not have terminated
15 the plaintiff but for her age.

16 The parties agree that the defendant terminated the
17 plaintiff and the plaintiff was 40 years of age or older at the
18 time of her termination.

19 If you find that the plaintiff has proved all three
20 of these elements, your verdict should be for the plaintiff on
21 this claim. If, on the other hand, the plaintiff has failed to
22 prove any of these elements, your verdict should be for the
23 defendant on this claims.

24 ADEA retaliation claim; elements and burden of proof.
25 The plaintiff claims that the defendant retaliated against her

Jury Instructions

1 in violation of the ADEA for complaining to the defendant about
2 alleged age discrimination. To prevail on this claim, the
3 plaintiff must prove each of the following elements by a
4 preponderance of the evidence.

5 First, the plaintiff participated in an activity
6 protected by the ADEA; that is, she complained to the defendant
7 that she was being discriminated against based on her age.

8 Second, the defendant subjected the plaintiff to an
9 adverse employment action; that is, termination of the
10 plaintiff's employment

11 And third, the plaintiff was subjected to an adverse
12 employment action because she engaged in an activity protected
13 by the ADEA.

14 A plaintiff is "subjected to an adverse employment
15 action" because she engaged in an activity protected by the
16 ADEA if the adverse employment action would not have occurred
17 but for her engagement in that activity.

18 The parties agree that the plaintiff engaged in an
19 activity protected by the ADEA and that her termination on
20 June 6th, 2019, constituted an adverse employment action.

21 If you find that the plaintiff has proved all three
22 of these elements, your verdict should be for the plaintiff on
23 this claim. If, on the other hand, the plaintiff has failed to
24 prove any of these elements, your verdict should be for the
25 defendant on this claim.

Jury Instructions

1 Age Discrimination in Employment Act; willfulness.

2 If you find in favor of the plaintiff on one of her ADEA claims
3 and find that the plaintiff is entitled to recover backpay on
4 that claim, you must also determine if the defendant's conduct
5 was willful.

6 The plaintiff has the burden of proving willfulness
7 by a preponderance of the evidence. A defendant's conduct is
8 willful if the defendant knew or showed reckless disregard for
9 whether the plaintiff's termination was prohibited by the ADEA.

10 The Family and Medical Leave Act and the Oregon Leave
11 Act. The plaintiff has brought a claim of employment
12 discrimination based on a federal law known as the Family and
13 Medical Leave Act, which will be referred to in these
14 instructions as "FMLA," and a similar state law known as Oregon
15 Family Leave Act, which will be referred to in these
16 instructions as OFLA.

17 Under the FMLA and OFLA, an eligible employee is
18 entitled to a total of 12 weeks of unpaid leave during any
19 12-month period for a serious health condition and to be
20 reinstated to the same or an equivalent position upon return
21 from leave. An employer may not interfere with, restrain, or
22 deny an employee the exercise of rights protected by the FMLA
23 or the OFLA or discriminate against an employee for opposing
24 any practice that is unlawful under the FMLA or the OFLA.

25 In this case, the plaintiff contends that the

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1 defendant discriminated and retaliated against her, in
2 violation of the FMLA and the OFLA, by considering her leave as
3 a negative factor in the defendant's decision to terminate the
4 plaintiff's employment. The defendant contends that it did not
5 interfere with plaintiff's rights under the FMLA and the OFLA,
6 because it provided plaintiff for the leave she requested, and
7 because the decision to terminate her employment was unrelated
8 to the plaintiff's use of leave.

9 FMLA and OFLA discrimination/retaliation; elements
10 and burden of proof. The plaintiff seeks damages against the
11 defendant for discrimination and retaliation under the FMLA and
12 the OFLA. Plaintiff must prove each of the following elements
13 by a preponderance of the evidence:

14 First, plaintiff availed herself of a right protected
15 under the FMLA and the OFLA; that is, plaintiff took medical
16 leave that she was entitled to under the FMLA and OFLA.

17 Second, the plaintiff was subjected to an adverse
18 employment action.

19 And third, a causal connection exists between
20 plaintiff's medical leave and the adverse employment action.

21 A causal connection exists between the plaintiff's
22 medical leave and the adverse employment action if the
23 employee's leave was a negative factor in the defendant's
24 adverse employment action. If you find that the plaintiff has
25 proved all three of these elements, your verdict should be for

Jury Instructions

1 the plaintiff on this claim. If, on the other hand, the
2 plaintiff has failed to prove any of these elements, your
3 verdict should be for the defendant on this claim.

4 State law employment discrimination;
5 hiring/discharge. The plaintiff claims that the defendant
6 discriminated against her in violation of state law by
7 discharging her because of her age. The plaintiff must prove
8 each of the following by a preponderance of the evidence:

9 First, the defendant terminated the plaintiff.

10 And second, the plaintiff's age was a substantial
11 factor in the defendant's decision to terminate plaintiff. The
12 parties agree that the defendant terminated the plaintiff. The
13 plaintiff's age was a "substantial factor" in the defendant's
14 decision to terminate the plaintiff if the defendant would not
15 have terminated the plaintiff but for her age. If you find
16 that the plaintiff has proved both of these elements, your
17 verdict should be for the plaintiff on this claim. If, on the
18 other hand, the plaintiff has failed to prove either of these
19 elements, your verdict should be for the defendant on this
20 claim.

21 Economic damages; all claims. It is the duty of the
22 Court to instruct you about the measure of damages. By
23 instructing you on damages, the Court does not mean to suggest
24 for which party your verdict should be rendered. If you find
25 for the plaintiff on any of the plaintiff's claims, you must

Jury Instructions

1 determine the plaintiff's damages. The plaintiff has the
2 burden of proving damages by a preponderance of the evidence.
3 "Damages" means the amount of money that will reasonably and
4 fairly compensate the plaintiff for any injury you find was
5 caused by the defendant.

6 You heard arguments and saw exhibits involving the
7 amount of defendant's revenue or profits. You are not to
8 consider evidence of defendant's wealth in determining
9 liability or damages in this case.

10 If you find for the plaintiff on any of her claims,
11 you should consider the reasonable value of lost past earnings
12 and fringe benefits from the date of plaintiff's termination up
13 to the date of trial. This is known as "backpay." It is for
14 you to determine what backpay damages, if any, have been
15 proved. Your award must be based upon evidence and not upon
16 speculation or guesswork.

17 If you find in favor of plaintiff on any of her
18 claims, you must also calculate separately, as future damages,
19 a monetary amount equal to the present value of the wages and
20 benefits that plaintiff would have earned had her employment
21 not been terminated for the period from the date of your
22 verdict until the date when plaintiff would have voluntarily
23 resigned/retired or obtained other employment. This is known
24 as front pay.

25 You may award plaintiff damages for future lost wages

Jury Instructions

1 only if you determine these damages were caused by defendant's
2 terminating her employment. If you determine plaintiff is
3 entitled to future lost wages, you must consider the following
4 in arriving at an amount:

5 First, plaintiff's prospect for another similar job.

6 Second, the length of time that it should take
7 plaintiff to get such job.

8 Third, the number of years remaining before plaintiff
9 would most probably retire.

10 Any front pay award for future economic damages must
11 be for the present cash value of those damages. "Present cash
12 value" means the sum of money needed now, which, when invested
13 at a reasonable rate of return, will pay future damages at the
14 time and in the amount that you find the damages will be
15 incurred.

16 The rate of return to be applied in determining
17 present cash value should be the interest that can reasonably
18 be expected from safe investments that can be made by a person
19 of ordinary prudence who has ordinary financial experience and
20 skill. You should also consider decreases in the value of
21 money that may be caused by future inflation.

22 Noneconomic damages. If, and only if, you find for
23 plaintiff on a False Claims Act retaliation claim, Oregon's
24 Whistleblower Protection law claim, or state law discrimination
25 claim, then should you also consider for such claim or claims

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1 only the emotional pain and suffering or humiliation that
2 plaintiff experienced and which, with reasonable probability,
3 she will experience in the future. You should also consider
4 inconvenience and interference with plaintiff's normal and
5 usual activities apart from activities in a gainful occupation
6 that you find have been sustained from the time she was injured
7 until the present that plaintiff probably will sustain in the
8 future as a result of her injuries.

9 Finally, you should consider any injury to
10 plaintiff's reputation. The law does not furnish you with any
11 fixed standard by which to measure the exact amount of
12 non-economic damages. However, the law requires that all
13 damages awarded be reasonable. You must apply your own
14 considered judgment, therefore, to determine the amount of
15 non-economic damages.

16 Damages; mitigation. The plaintiff has a duty to use
17 reasonable effort to mitigate damages. To "mitigate" means to
18 avoid or reduce damages. Defendant is not required to
19 compensate plaintiff for avoidable damages. The defendant has
20 the burden of proving by a preponderance of the evidence:

21 First, that the plaintiff failed to use reasonable
22 efforts to mitigate damages.

23 And second, the amount by which damages would have
24 been mitigated.

25 Duty to deliberate. Before you begin your

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1 deliberations, elect one member of the jury as your presiding
2 juror. The presiding juror will preside over the deliberations
3 and serve as a spokesperson for the jury in court. You should
4 diligently strive to reach agreement with all the other jurors
5 if you can do so.

6 Your verdict must be unanimous. Each of you must
7 decide the case for yourself, but you should do so only after
8 you have considered all of the evidence, discussed it fully
9 with the other jurors, and listened to their views. It is
10 important that you attempt to reach a unanimous verdict, but of
11 course, only if you can do so after having made your own
12 conscientious decision. Do not be unwilling to change your
13 opinion if discussions persuade you that you should. But do
14 not come to a decision simply because other jurors think it is
15 right or change an honest belief about the weight and effect of
16 the evidence simply to reach a verdict.

17 Communication with the Court. If it becomes
18 necessary during your deliberations to communicate with me, you
19 may send a note through the bailiff, signed by any one or more
20 of you. No member of the jury should ever attempt to
21 communicate with me except by a signed writing. I will not
22 communicate with any member of the jury on anything concerning
23 the case except in writing or here in open court.

24 If you send out a question, I will consult with the
25 lawyers before answering it, which may take some time. You may

Jury Instructions

1 continue your deliberations while waiting for the answer to any
2 question. Remember, you are not to tell anyone, including the
3 Court, how the jury stands, whether in terms of a vote count or
4 otherwise, until after you have reached a unanimous verdict or
5 your service has been terminated.

6 Return of the verdict. A verdict form has been
7 prepared for you. After you have reached unanimous agreement
8 on the verdict, your presiding juror should complete the
9 verdict form, according to your deliberation, sign and date it,
10 and advise the bailiff you are ready to return to the
11 courtroom.

12 As stated in prior instructions, there will not be a
13 transcript of the trial available to you. Therefore, please
14 rely on your memory of the evidence and any notes that you took
15 during the trial.

16 I do have the original verdict form, which I will now
17 hand to the clerk. He will hand it to you. It consists of 12
18 questions. You will complete some or all of the questions,
19 depending on your deliberations.

20 There is a signature line for the presiding juror and
21 a date.

22 And as I said, once you have reached a verdict, if
23 you would just let the Court know at that time, we will gather
24 together, and we will return to court.

25 I will hand you the verdict. Thank you, Gary. And

Jury Instructions

1 the instructions.

2 We will hand out copies of the instructions. As I
3 indicated, you can take those to the jury room and rely on
4 those.

5 MS. RIECHERT: I want to be sure, Your Honor, that
6 everything you read is in that set of instructions, even the
7 ones we recently added?

8 THE COURT: No.

9 MS. RIECHERT: The one we added this morning and at
10 lunchtime?

11 THE COURT: The one that was added this morning is
12 in; the one we just discussed is not in. We can add that one
13 instruction and then distribute it to the jury.

14 Jury, the exhibits will be coming to you shortly as
15 well, and you will get an actual hard copy of the exhibit
16 notebooks to be used. We will get you started and then change
17 the instructions.

18 (Jury retired to deliberate at 1:35 p.m.)

19 (Open court; jury not present:)

20 THE COURT: Be seated.

21 MR. OSWALD: Your Honor, for the record, I would like
22 to renew my objection that we had during the jury instruction
23 conference. Just for record, for maintenance purposes, the
24 plaintiff, in terms of the substantive instructions, renews its
25 objection to Instruction No. 14, No. 16, No. 17, and the basis

1 of the objection is as stated earlier, Your Honor.

2 I believe that the Court's formulation here, of
3 including "but for" language, is incomplete and therefore
4 misleading for the jurors. The appropriate standard is, as
5 stated in Bostock and Thomas for all three -- again, without
6 going through each one, I would just for the record purposes,
7 could we have for all three -- 14, 16 and 17. Specifically the
8 objection is that it should state that if you indicate that the
9 standard is "but for," that it is a "but for" cause or one "but
10 for" cause, consistent with Bostock and Thomas rather than its
11 current formulation, which potentially will prejudice the jury.

12 I have just the additional objection to the Court
13 instruction on the demonstrative exhibit, as well for the
14 reasons previously stated, that we objected to. That's it,
15 Your Honor, just for the record purposes.

16 THE COURT: Perfect. Thank you.

17 MS. TALCOTT: Your Honor, the defense renews its
18 objection to the FMLA and OFLA discrimination retaliation
19 instruction, which I believe is No. 19, for the reasons stated
20 this morning and specifically that the Court is using a
21 negative factor test for causation. Under Price v. Multnomah
22 County and Nassar, we think it is a "but for" standard that
23 applies to the FMLA claim, and then for OFLA it should be the
24 substantial factor.

25 THE COURT: Thank you.

1 MR. MCCARTHY: Judge, just one clarification, on the
2 record for one exhibit, and I believe the parties are in
3 agreement about this. But following a discussion with
4 Mr. Magnuson, we thought we should put it on the record.
5 Exhibit 554 is a group of text messages that we discussed in
6 the pretrial conference. There is an objection to a portion of
7 the text messages. Following our agreement that we would
8 redact the irrelevant text messages, I believe the parties are
9 in agreement that 554 should be admitted. It has been
10 redacted. I just want to make clear on the record.

11 THE COURT: Thank you.

12 MR. OSWALD: Your Honor, I think I didn't fully
13 grasp -- you communicated that they could consider evidence of
14 the underlying exhibit. Then I think the exhibit you named is
15 55. It is actually 54, which is the 2018 numbers, and 62,
16 which are the 2019 numbers.

17 THE COURT: 54 and 64?

18 MR. OSWALD: No, no. 54 and 62. 54 being the 2018
19 numbers; 62 being the 2019 numbers.

20 THE COURT: Okay.

21 MS. RIECHERT: Is Your Honor going to type up that
22 page and add it to the instruction?

23 THE COURT: I think we will have to amend page 9
24 under "Charts and Summaries." I will add that with the correct
25 exhibit numbers, Plaintiff Exhibit Nos. 54 and 62, substitute

1 the page, and distribute it to the jurors.

2 THE CLERK: Your Honor, to clarify on the record,
3 Defendant's Exhibit 544, as redacted, is received?

4 THE COURT: Yes. Thank you.

5 THE CLERK: Thank you.

6 MR. OSWALD: The jury instructions have not yet gone
7 back there?

8 THE COURT: Correct.

9 MR. OSWALD: I understand.

10 THE COURT: No, they have not.

11 Anything further?

12 MR. McCARTHY: Just that I think we wanted to have an
13 opportunity to review the plaintiff's exhibit book, which I
14 understand we will do when there is the appropriate time to do
15 so.

16 THE CLERK: In a moment here.

17 THE COURT: I am sure Mr. Magnuson will ask for your
18 cell phone numbers. Just be five, ten minutes away in case
19 there is a question or something comes up so you can hustle
20 back quickly.

21 Okay. I will go correct the instructions, and then
22 we will be in touch.

23 Thank you very much, everybody. I appreciate all of
24 you during six long days.

25 MR. OSWALD: Your Honor, I want to thank your staff.

1 We want to thank you for your grateful stewardship over the
2 last six days. I know it has been a while since you have had
3 human beings in a trial in court. So we are privileged to be
4 the human beings that showed up for the first one. Thank you.
5 We are grateful. And I know I speak for the defendants as
6 well.

7 THE COURT: Thank you.

8 Okay. We are in recess.

9 (Recess pending verdict.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

September 27, 2021
DATE

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